Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

ODIS TUCKER, VONNIE TUCKER,
and BLAKE TUCKER,

Petitioners,

v.

HARDIN COUNTY, a political subdivision of State of Tennessee, SAVANNAH POLICE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 16, 2009

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QUESTIONS PRESENTED

1. Whether, in a case seeking damages for the failure to provide a reasonable accommodation under Title II of The Americans with Disabilities Act (42 U.S.C. §12132), the plaintiff must prove as a part of his claim, (i) "intentional discrimination" as required by the Sixth Circuit, (ii) "personal animus" underlying the failure to accommodate, as required by the First and Eleventh Circuits; (iii) "deliberate indifference to a recognized federal right", as required by the law of the Second, Ninth, and Tenth Circuits, (iv) intentional discrimination by failing to accommodate as required by the Fifth Circuit; or (v) simply an unreasonable "failure to accommodate" as held by the Fourth and Seventh Circuits?

2. Whether, under Title II of The Americans with Disabilities Act (42 U.S.C. §12132), the "effectiveness" of a "auxiliary aid" proved by a public entity is a question of law to be decided by the court, as held by the Sixth and Eleventh Circuits or is it a question of fact to be decided by a jury as held by the Third, Eighth and Ninth?

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PETITION FOR A WRIT OF CERTIORARI

Odis Tucker, Vonnie Tucker, and Blake Tucker, who are the original plaintiffs in this matter, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit that the Petitioners, as a matter of law, failed to prove that defendants, City of Savannah Tennessee Police Department, and Hardin County, Tennessee had intentionally discriminated against them due to their hearing and speech disability by failing to provide "auxiliary aids" or that these public entities failed to provide effective "auxiliary aids" to accommodate their disabilities in violation of *42 U. S. C. §12132; 28 C.F.R. § 35.130* and *28 C.F.R. § 35.160*.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (Apx. Pg. 3a) is reported at 539 F.3d 526 (6th Cir. 2008). The District Court opinion as to the Petitioners claims against City of Savannah, Tennessee is reported at 443 F.Supp.2d 971 (W.D. TN, 2006)(Apx. Pg. 49a). The District Court opinion as to the Petitioners' claims against Hardin County, Tennessee is reported at 448 F.Supp.2d 901 (W.D. TN, 2006)(Apx. Pg. 61a). Petitioners' claims against the State of Tennessee were dismissed by the District Court on August 2, 2005. That opinion is unreported. (Apx. Pg. 74a) Petitioners did not pursue an appeal to the Sixth Circuit against that public entity.

JURISDICTION

The initial judgment of the Court of Appeals was entered on August 29, 2008. A timely petition for re-hearing and hearing *en banc* was filed on September 15, 2008. The petition for re-hearing and hearing *en banc* was denied on January 16, 2009. (Apx. Pg. 1a) The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS AND REGULATIONS OF THE DEPARTMENT OF JUSTICE

Title II of the Americans with Disability Act of 1990 provides in pertinent part:

42 U.S.C. §12132 states:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

42 U.S.C. §12133 states:

> "The remedies, procedures, and rights set forth in Section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of Section 12132 of this title."

28 C.F.R. Part 35 states in pertinent part:

28 C.F.R. §35.130

"(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless

such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others; . . .

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service."

28 C.F.R. §35.160 states in pertinent part:

"(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities."

28 C.F.R. §35.164

"This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature or a service, program or

activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity."

STATEMENT OF THE CASE

1. Congress enacted the Americans with Disabilities Act" ("ADA") to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *42 U.S.C. §12101(b)(1); see Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Title II specifically provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or

denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." *42 U.S.C. §12132.*

To promote the effective integration of this national mandate into practice, the Congress required the Attorney General to enact regulations no later than July 26, 1991 to implement the law. *42 U.S.C. §12134* In compliance with that requirement, the Attorney General adopted enabling regulations that have been published at *28 C.F.R. Part 35.* These regulations are entitled to substantial deference by the courts. *Blum v. Bacon*, 457 U.S. 132 (1982).

Included in those regulations are provisions that prohibit public entities from denying a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service. *28 C.F.R. §35.130(b)(1)(I).* The regulations make clear that a public entity has an affirmative duty to accommodate the individual with a disability by providing "auxiliary aids" that ensure communications with hearing and speech disabled persons are as effective as communications with others. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 275-76 (2nd Cir., 2003); *Ferguson v. City of Phoenix,* 157 F.3d 668, 678(9th Cir., 1998). This accommodation must be done giving "primary consideration" to the aid requested by the disabled person. *28 C.F.R. §35.160.*

This duty to provide accommodations as requested by the disabled person is limited by proof presented by the public entity that, considering all funding and operating resources available, the proposed accommodation would result in (1) a fundamental alteration in the nature of the service, program or

activity; or (2) undue financial or administrative burdens. In order for these exemptions, a public entity must provide a written statement explaining its justifications. *28 C.F.R. §35.164.*

2. The Petitioners, Odis Tucker and Vonnie Tucker are husband and wife. Blake Tucker is Vonnie's son.[1] These Petitioners are disabled because they are deaf and mute. These parties, at the time of this incident were all residents of the State of Alabama.. Blake Tucker was married to Lauren Tucker. They had a baby together. Lauren and the baby also have hearing and speech disabilities. (6th Cir. Joint Apx. Pgs. 30; 41)

On the evening of Sunday, February 29, 2004, Blake and Odis Tucker drove from their home in Alabama to pick up Lauren and the baby. Lauren had been visiting with her mother Donna Spears at her home in Savannah, Tennessee. Donna Spears did not have a disability. Lauren had been visiting with her mother for a few days prior to the Tucker's arrival. While the Tuckers were waiting for Lauren to come out and leave with the baby, one of the neighbors called the police. (6th Cir. Joint Apx. 43)

(1) Contact by the Petitioners Odis and Blake Tucker with officers of the City of Savannah Police Department.

Officer Mike Pope of the Savannah Police Department was the first to arrive after the call. He knew that Lauren was deaf and mute. Blake tried to

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[1] The parties will be referred to hereafter by their first name for brevity purposes.

communicate with Officer Pope through writing. When Blake tried to write something on a piece of paper, the officer responded by asking him if he "read lips". Blake responded that he didn't, and the police officer wrote on the paper, "What's going on?" Blake responded, "I don't know, why are you here?" To that, the officer responded, "Let me check." The police were clearly informed that the Tuckers wanted the assistance of a sign language interpreter. Thereafter, there was no written communications between Blake Tucker and the police. There was no written communications between the police and Odis Tucker. (6th Cir. Joint Apx. Pgs. 16; 219-220; 338-40; 415-16; 442-42; 443-445).

Lauren Tucker told the police in writing that she wanted to go with Blake. She was not able to understand what was being said around her in conversations between the officers and her mother. Lauren specifically requested that a sign language interpreter be provided. She was so frustrated with her inability to communicate that she began screaming: "Get an interpreter, Get an Interpreter". (6th Cir. Joint Apx. Pgs. 443 - 47).

Donna Spears, Lauren's mother, played an active role in escalating the tensions between the parties. She had the advantage because she was not hearing and speech disabled. Her ability to communicate enabled her to persuade the police to let her continue to be involved and obstruct the Tuckers departure. (6th Cir., Joint Apx. Pgs. 225-32; 344-56)

During the Tuckers attempt to leave, and for no apparent reason, Officer Pope put Blake in his patrol car and "spoke" to him. Blake interpreted Pope's

comments to him as being that Lauren wanted to go home with him, but if he didn't treat her well, he would get him. This was Blake's understanding because Pope put his fist in the air like he was going to hit him, and writing this comment on a piece of paper. (6th Cir. Joint Apx. Pgs. 349-350)

After the Tuckers understood that they were able to leave, Donna Spears and her neighbor, Judy Crotts, spoke with the officers and got the officers to interfere again with the departure so that they could hold the baby again. (6th Cir. Joint Apx. Pgs. 247; 351-54; 447-50; 559). Blake tried to close the door to the vehicle when Donna Spears assaulted him and pulled him in the way of the closing door ripping his shirt. The police then took Donna to the ground. Blake then again tried to close the door and Judy Crotts got in the way trying to prevent him from closing the door. He put his arm out to keep her from interfering and she fell back to the ground. The police then jumped him. He tried to "sign" to them, "Wait a minute, Wait a minute" in an effort to communicate with them and tell them that he wasn't getting physical. The police then took him to the ground. Blake refused to put his hands behind his back because that was how he "communicated". They then hit him in the mouth with a gun chipping his tooth, and he was punched in the face three or four times. (6th Cir. Joint Apx. Pgs. 353-56).

While the arrest of Blake was taking place, Odis was "screaming" in sign language telling the officers to not hit Blake. Odis approached the officers signing to them to not hurt Blake. Odis was pushed back by one of the officers. At that time, Officer Pope pulled his gun and pointed it at Odis and started saying things to

him that he did not understand. He thought that the officers wanted him to follow them. That was when they arrested him. (6th Cir. Joint Apx. Pgs. 251-54).

At the time of this incident, the City of Savannah had a policy that sign language interpreters would be provided upon request. This policy was adopted by the City in order for them to come into compliance with Title II of the ADA and its enabling regulations. This policy was known by the officers at the scene. (6th Cir. Joint Apx. Pgs. 511, 524; 554-55). The officers interpreted the sign language gestures of the Tuckers as "anger and agitation". (6th Cir. Joint Apx. Pgs. 610-611). The officers had no training concerning how to deal with people who were hearing and speech disabled, and expected the Tucker's to "read their lips". (6th Cir. Joint Apx. Pgs. 522; 559-60). There were sign language interpreters readily available in Hardin County. (6th Cir. Joint Apx. Pg. 553). Despite their policy, and the availability of sign language interpreters, City of Savannah had no list of available sign language interpreters that were available to the officers. (6th Cir. Joint Apx. Pgs. 526).

(2) The booking of the Petitioners at the Hardin County Jail.

Odis and Blake were taken to the Hardin County Jail after their arrest. Blake and Odis were booked shortly after coming into the jail and before they were allowed a telephone call. (6th Cir. Joint Apx. Pgs. 371-372). Blake requested to make a phone call and was initially denied. Some time later, Blake again requested a phone call from Hardin County Officer Franks and asked to use a TTY device. Blake was

advised that Hardin County didn't have a TTY device. (6th Cir. Joint Apx. Pgs. 393-95).

Vonnie Tucker called the jail sometime thereafter, and Odis was taken out of the cell to receive the call. Thereafter, Jailers Franks and Pinson transcribed the messages from Vonnie that they received from the relay operator and then read hand written messages to the relay operator. (6th Cir. Joint Apx. Pgs. 276-77; 371-72; 393-95; 397-402; 793-94; 803; 923-94; 956) Officer Pinson testified that the Tuckers were treated differently than any other person who was arrested who were not disabled. (6th Cir. Joint Apx. Pgs. 956)

Hardin County did not provide any training to their officers as to how to address the needs of individuals with disabilities in the jail. (6th Cir. Joint Apx. 947-48; 954). In addition, Hardin County had failed to modify their policies or procedures for their employees to follow to come into compliance with the ADA requirements to accommodate individuals with hearing and speech disabilities. Hardin County had not performed a self-evaluation as required by the regulations and there existed no training manuals, videos, or plan of action to address the communication needs of deaf and/or mute individuals. (6th Cir. Joint Apx. Pgs. 947-50)

(3) The arraignment of the Petitioners in the Hardin County General Sessions Court.

While the Tuckers were at the jail the night before, they were told that they would be going before the Judge the next morning. They specifically inquired and requested that a sign language interpreter be present for the hearing and were told by Officer

Franks that he was not sure but thought one would be there for them. (6th Cir. Joint Apx. Pgs. 908-909). When they arrived for court the next morning, there was not sign language interpreter. The General Sessions Judge was aware of his responsibility as a member of the Judiciary to provide sign language interpreters. (6th Cir. Joint Apx. Pgs. 958).

The Judge sent a note to Blake and Odis stating that he would save their case for last so that they could have more time to communicate with them. When their case was called and they were motioned to come forward, they started asking for an interpreter. They got no response. They wrote down on a piece of paper that they were not guilty. (6th Cir. Joint Apx. Pgs. 311; 421-22). They were not advised of their rights or what they were charged with (6th Cir. Joint Apx. Pgs. 278-81; 311-12; 402-05) This was despite the fact that the Judge acknowledged that it was his responsibility to make sure the defendants knew their rights and what they were charged with. He felt that they understood their rights because they "shook their heads" when he told them their charges. (6th Cir. Joint Apx. Pgs. 690; 692). The Tuckers did not understand what he was saying to them. (6th Cir. Joint Apx. Pg. 312-13; 421). They were given a card that told them to be back for court on March 19, 2004.

(4) The Dispositional Hearing of the Petitioners.

Prior to the March 19, 2004 dispositional hearing, the Tuckers hired attorney Rusty Larson. They meet with him on March 11, 2004. He sent a notice to the court on March 15, 2004 of their need for an interpreter. According to Mr. Larson, he received no

response to that request, and was not aware that the proceedings would be postponed. He did raise the issue with Asst. Dist. Atty. John Overton who told him that there would be no interpreter because they were "too expensive". (6th Cir. Joint Apx. Pgs. 913-14). The Tuckers became aware that there would be no sign language interpreter present when they arrived for court on March 19, 2004. (6th Cir. Joint Apx. Pg. 914).

When the Tuckers arrived at the court house, Blake was upset due to Judge Smith's representation to him at the arraignment that an interpreter would be present for the March 19, 2004 hearing. (6th Cir. Joint Apx. Pgs. 404) Their lawyer discussed and negotiated the charges with the Asst. Dist. Atty. After this negotiation, Larson presented the plea to them. Blake felt that he had to accept the plea agreement that day or it would not be available to him and the charges would not be dropped on Odis. If the hearing date was postponed, there was no guarantee that Hardin County would provide an interpreter due to the cost. (6th Cir. Joint Apx. Pgs. 370-71; 337-38; 811-15; 914-16; 928; 940) Blake did not understand the information that was presented to him in the court room due to its legal nature, and was never aware that the judge advised him of any of his rights. There was little if any communication between he and the judge. He was confused and frustrated because he did not understand what was being said and what was going on in court. (6th Cir. Joint Apx. Pgs. 420-41; 423-25)

Vonnie Tucker is not a certified sign language interpreter and did not attend the court proceedings for the benefit of the court. She was requested to serve as the interpreter for the proceedings where Blake's plea was taken by the court because she was the only

"auxiliary aid" available. She was uncomfortable with the situation and found the translating in the court room very difficult. She could not understand what the court was saying because she was having to read the judge's lips. (6th Cir. Joint Apx. Pgs. 926-27; 972)

On August 29, 2008, a divided court of appeals, sustained the District Court's grant of Summary Judgment as to the Tuckers's claims of discrimination based on these set of facts. *Tucker v. Hardin County, Tennessee,* 539 F.3d 526 (6th Cir. 2008; Apx. Pg. 3a) The Petitioners filed a Motion for Rehearing or in the alternative hearing *en banc*. This motion was denied on January 16, 2009.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to resolve two widespread and entrenched conflicts in the Circuits pertaining to the proof of one of the most common types of claims raised under the ADA - the failure to reasonably accommodate an individuals disability through the provision of auxiliary aids or services. Although the ADA is a single federal statute prescribing uniform federal standards for nationwide application, the required proof for such failure-to-accommodate claims diverges widely based on nothing more than circuit geography because of those circuit conflicts. In some Circuits, these petitioners would be required to prove that intentional discrimination or personal animus motivated the failure to accommodate; other plaintiffs in other Circuits must prove deliberate indifference; while sill other plaintiffs need only prove the unreasonable failure to accommodate. Likewise, the adequacy of the accommodation is a fact question for the jury in some

Circuits, while it is resolved as a question of law in other Circuits. Only this Court's review can bring stability and uniformity to the interpretation and enforcement of this widely invoked and important civil rights statute.

1. UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT (42 U.S.C. §12132) INVOLVING CLAIMS FOR COMPENSATORY DAMAGES, THERE ARE SERIOUS CONFLICTS IN THE CIRCUIT COURTS AS TO WHETHER THE DISCRIMINATION AGAINST A QUALIFIED INDIVIDUAL WITH A DISABILITY MAY BE PROVEN BY (1) EVIDENCE OF AN UNREASONABLE "FAILURE TO ACCOMMODATE" AS HELD BY THE FOURTH AND SEVENTH CIRCUITS; (2) "PERSONAL ANIMUS" AS HELD BY THE FIRST AND ELEVENTH CIRCUITS; (3) "DELIBERATE INDIFFERENCE" TO A RECOGNIZED FEDERAL RIGHT AS HELD BY THE SECOND, NINTH, AND ELEVENTH CIRCUITS; (4) "INTENTIONAL DISCRIMINATION" AS HELD BY THE SIXTH CIRCUIT; OR (5) INTENTIONAL DISCRIMINATION BY FAILING TO REASONABLY ACCOMMODATE AS REQUIRED BY THE FIFTH CIRCUIT.

The court of appeals here upheld dismissal of the petitioner's case because they had failed to prove that the defendants had "intentionally discriminated" in denying them reasonable and adequate accommodations under the ADA. While the standard has been echoed by a couple of other courts of appeals, in other Circuits, very different standards govern cases just like the petitioners.

On the issue of what kind of discrimination must be proven by a plaintiff, there appear to be five different standards of proof that have been established by the various Circuits that have addressed the issue. In this case, the Sixth Circuit has established a standard described as "Intentional Discrimination". There is no explanation of what that term means other than these plaintiffs failed to prove that the public entities were intentionally discriminating against them by not providing requested auxiliary aids. *Tucker v. Hardin County, TN*, 539 F.3d 526(6th Cir. 2008).

In the Fourth and Seventh Circuits, actions for compensatory damages may be brought under either an "intentional discrimination" theory or a "failure to accommodate standard". Under the "failure to accommodate standard" there is no requirement to prove any form of "intent" on the part of the public entities. *A Helping Hand, LLC v. Baltimore County, MD*, 515 F.3d 356, 362 (4th Cir. 2008)(failure to make reasonable accommodations constitutes actionable discrimination); *Good Shepherd Manor Foundation, Inc. v. City of Momence*,323 F.3d 557, 561-562 (7th Cir. (Ill.), 2003)(failure to accommodate is actionable as discrimination no matter the motive of the public entity).

On the other extreme, in the First and Eleventh Circuits, an ADA plaintiff must prove that the public entity had "personal animus" towards the disabled person. *Fradera v. City of Mayaguez*, 440 F.3d 17, 22-23 (1st Cir., 2006)(failure to prove disability based animus was fatal to discrimination claim); *Wood v. President and Trustees of Spring Hill College in City of Mobile*, 978 F.2d 1214, 1219 (11th Cir. (Ala.),1992)(what is required in circuit to prove

discrimination is unclear, but jury charge requiring proof of discriminatory animus was not plain error).[2]

Yet a fourth standard governs in the Second, Ninth, and Tenth Circuits, which hold that proof of "deliberate indifference" by the public entity presents a *prima facia* case. *Bartlett v. New York State Bd. of Law Examiners,* 156 F.3d 321, 331-332 (2nd Cir.,1998)(intentional discrimination is inferred from a policy holders deliberate indifference to a recognized federal right); *Lovell v. Chandler*, 303 F.3d 1039, (9th Cir., (Hawaii), 2002)(intentional discrimination is inferred from conduct that shows deliberate indifference to protected federal right); *Duval v. County of Kitsup,* 260 F.3d 1124, 1129 - 1138 (9th Cir. 2001)(same as *Lovell)*; *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. (Wyo.),1999)(intentional discrimination is inferred from deliberate indifference).

The Fifth Circuit, for its part, has concluded that proof of "intentional discrimination" is required, but discounted a "deliberate indifference" standard. In

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[2] In the unreported case of *Saltzman v. Board of Com'rs of North Broward Hosp. Dist.*, 239 Fed.Appx. 484, 2007 WL 1732893 (2007), the Eleventh Circuit said that they had not held one way or the other whether "intentional discrimination" required personal animus or whether deliberate indifference would qualify. In that case, the court held that the hospital had no responsibility to provide a sign language interpreter for a patient because the failure to provide one was not "intentional discrimination". This case shows that there is uncertainty not only among the Circuit Courts, but in the Circuit Courts. This Circuit appears to be unprepared to make a definitive ruling.

Delano-Pyle v. Victoria County, Tex., 302 F.3d 567 (5th Cir., 2002) the court noted:

> "there is no requirement to prove that a public entity has a "policy of discrimination" to establish intentional discrimination. In addition, there is no "deliberate indifference" standard under the ADA. The failure to respond to a circumstance where an accommodation is obvious and the failure to provide a hearing impaired individual a reasonable accommodation can constitute "intentional discrimination". Id at 575.

It is also significant in that the guidance from the Justice Department does not require or even mention "intentional discrimination" as a requirement for a public entity to be held accountable for discrimination. For example, on the issue of the necessity of sign language interpreters at police confrontations, the Department of Justice guidance in a publication entitled "Communicating with People who are Deaf or Hard of Hearing" (Apx. Pg. 103a), there is a discussion and explanation entitled *"What Situations Require an Interpreter"*. This guidance specifically notes that under circumstances, such as those confronted by the Petitioners at the initial contact with the City of Savannah Police Department, a sign language interpreter would be required. It further notes that it is "inappropriate" to ask a family member or companion to interpret.

This is further addressed in a DOJ publication entitled, "Commonly Asked Questions About the Americans with Disability Act and Law Enforcement". (Apx. Pg. 80a) Question 10 states, "Do police

departments have to arrange for a sign language interpreter every time an officer interacts with a person who is deaf?" Thereafter, there is a discussion that states that the necessity of a sign language interpreter depends on the circumstances. It gives the example of a deaf mother who calls the police to report a crime in which the child has been abused by her father. A sign language interpreter is requested, but law enforcement refuses and enlists the mother to interpret for the daughter. In this scenario, the DOJ states emphatically that: "The police department in this example has violated the ADA because it ignored the mother's request and inappropriately relied on a family member to interpret". (Apx. Pg. 90a).

The violation in this example is quite clear, and it has nothing to do with "personal animus". It also does not give the police agency an out because they "could not have anticipated this event". This scenario violates the ADA because the police department ignored the mother's request.

In the case before the court, there is no question that at the initial contact with the City of Savannah Police Department, the Tuckers requested a sign language interpreter. There is no question that the police relied on Lauren Tucker's mother as an interpreter. However, in the Sixth Circuit, because of the holding in this case, a police department never has to provide a sign language interpreter at a police confrontation, because the failure to do so does not constitute "intentional discrimination" as a matter of law.

In the case now before the court, the plaintiffs were specifically denied requested accommodations by the

public entity in each of the circumstances they were confronted. In each case, the public entity denied the requested accommodation of a sign language interpreter. The public entity never went through the undue burden analysis required by *28 C.F.R. §35.164.* These defendants just decided to apply their own *ad hoc* alternative without any consideration of the law or regulations.

It is clear that if the Tuckers's case had been brought in the Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits, they would not have had Summary Judgment granted against them due to their failure to prove that the public entity "intentionally discriminated" against them.[3] However, because they happened to be discriminated against in a Circuit that requires proof of undefined "intentional discrimination", their claims are not actionable as a matter of law. This inconsistent standard among the Circuits is a condition that this court must not let continue because it denies all parties a consistent standard of law that should be applied to all under the ADA.

II. THERE ARE SERIOUS CONFLICTS IN THE CIRCUIT COURTS AS TO WHETHER THE "EFFECTIVENESS" OF A PROFFERED "AUXILIARY AID" BY A PUBLIC ENTITY IS A QUESTION OF LAW TO BE DECIDED BY THE COURT OR A QUESTION OF FACT THAT SHOULD BE DECIDED BY A JURY WITH THE SIXTH AND ELEVENTH CIRCUITS HOLDING

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[3] The Third and Eighth Circuits do not appear to have addressed the requirement to prove "intentional discrimination".

THAT "EFFECTIVENESS" IS A QUESTION OF LAW, AND THE THIRD, EIGHTH, AND NINTH CIRCUITS HOLDING THAT "EFFECTIVENESS" IS A QUESTION OF FACT.

In the case before the court, in each of the events that the Plaintiffs were in contact with the public entities, they specifically requested the assistance of a sign language interpreter or, as in the case of their booking at the Hardin County Jail, they requested a TTY/TTD machine to facilitate their communications with their family. In each of the circumstances raised by the Plaintiffs, the Court held that as a matter of law, the provided aids of hand gestures, pen and paper, lip reading, untrained relay operators, and hearing and speech disabled family members serving as interpreters, were effective enough to provide the Petitioners the benefit of the service, program or activity. This finding was despite the Petitioners's testimony that they were confused as to what was being said by others, and that the communications were not "effective".

All Circuit courts, other than the Sixth Circuit in this case and the Eleventh Circuit, have held that the "effectiveness" of an "auxiliary aid" tendered by a public entity as an alternative to the one requested by the disabled person to be a fact question submitted to a trier of fact. *Chisolm v. McManimon*, 275 F.3d 315, 327-328 (3d Cir. 2001); *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999); *Duffy v. Riveland*, 98 F.3d 447, 454, 455 (9th Cir. 1996).

Here, however, the Sixth Circuit decided in the face of numerous genuine issue of material fact that, as a

matter of law, that these accommodations were effective.

A specific example of how serious the conflict is on this point involves the TTY/TTD machine. The defendant Hardin County had never had one. When Vonnie Tucker called the jail, after Odis and Blake were denied their required phone call, two untrained jailers, based on their own decision, provided the communications by taking written notes from the plaintiffs, reading them over the phone to another relay operator who in turn relayed the communications to Vonnie Tucker.

Despite the fact that the Hardin County Jailers acknowledged that this process was different than that provided to other inmates who were not disabled, the majority opinion concluded that this was "as effective as those provided to non-disabled persons". *Tucker* at 538.[4] As such, the Circuit Court concludes, the Plaintiffs testimony not withstanding, that as a matter of law an untrained jailer serving as a relay operator is sufficiently "effective" that there are no material issues of fact.

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[4] At one point, the majority opinion acknowledged the determination of whether the use of the "relay operators" was effective was a question of fact. Despite this acknowledgment, the majority opinion thereafter concluded that there were no material issues of fact that the failure of Hardin County to have a TTY/TTD machine as standard equipment, and that the accommodation provided to them was not only reasonable, but allowed the Tuckers a means of communication that was as effective as that provided to non-disabled persons. *Tucker* at 539.

This flies in the face not only of the rulings of other circuits, but also of the regulations established by the Department of Justice. 28 C.F.R. § 35.160 which provide:

> (b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.
>
> (2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities. (Emphasis added).

In support of this regulation the Department of Justice has provided guidance to police agencies in the form of "Frequently Asked Questions". In reference to the issue of how arrestees may communicate on the telephone in jail, it states:

> "• Arrestees who are deaf or hard of hearing, or who have speech disabilities, may require a TDD device for making out going calls. TDD's must be available to inmates with disabilities under the same conditions under the same terms and conditions as telephone privileges are offered to all inmates, and information indicating the availability of the TDD should be provided." U.S. Dept. of Justice, "Commonly Asked Questions About the Americans With Disabilities Act and Law Enforcement", at Question 16. (Apx. Pg. 38a).

The dissenting opinion in this case relied extensively on this statement in holding that petitioners should have been able to go to the jury on their claims. *Id.* at 543.

The opinion also contradicts other guidance given to police agencies as to when interpreters are necessary. In a directive published by the Department of Justice entitled "Communicating With People Who Are Deaf or Hard of Hearing, ADA Guide for Law Enforcement Officers" (Apx. Pg. 103a). A sign language interpreter is required during "domestic disturbances". It also notes that it is "inappropriate" to ask a family member or companion to interpret because of emotional issues. Clearly, this guidance as to how police officials should communicate with hearing and speech impaired individuals is an example of why a court cannot and should not decide these issues in the form of Summary Judgment.

There is a substantial conflict in the Circuits about the necessity of having a TTY/TTD machine available. There is much disagreement as to whether it is an actionable claim of discrimination for failing to provide a TTY/TTD machine, despite the Federal regulatory guidance to the contrary. In the Sixth and Eleventh Circuits, it appears that the failure to provide these machines does not constitute discrimination because passing notes and reading the notes over the telephone is effective as a matter of law. *Tucker,* supra.; *Bircoll v. Miami Dade County, Fl,* 480 F.3d 1072, 1088 (11th Cir., 2007). However, in the Third and Tenth Circuits, such a fact situation does not constitute grounds for Summary Judgment. *Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1198

(10th Cir. 2007); *Chisolm v. McManimon*, 275 F.3d 315, 319 (3rd Cir., 2001).

In light of these profound disagreements, it is vital for this court to grant certiorari in this matter.

CONCLUSION

The conflict in the circuit courts as to the issues presented in this Petition are not only profound but the resolution of this conflict is of critical national importance to the future success of the ADA. The record in this case is replete with examples of defendant public entities failing to modify their programs to provide reasonable and effective accommodations for hearing and speech disabled citizens, and instead providing *ad hoc* responses with no forethought, training, policies or most importantly the accommodation requested by the disabled person as required by *28 C.F.R. §35.160(b)(2)*. The result of a failure by this court to grant the Petition will be that, at least in the Sixth Circuit, an arrestee will never have a right to any requested accommodation, no matter the surrounding circumstances before or after his arrest, because that person can never prove "intentional discrimination".

No jails in the Sixth Circuit will ever have to have a TTY/TTD machine, the Justice Department regulations and guidance not with standing, because a disabled person can never prove that the public entity's failure to have one in place constitutes "intentional discrimination". In the Sixth Circuit, the use of pen and paper, and the enlisting of family members to serve as interpreters in court proceedings will become standard procedure, both Federal

regulations and state law to the contrary, because disabled people can never prove that a court's failure to provide a sign language interpreter was "intentional discrimination" or that the provided aid was not effective in providing the same benefit. The hearing and speech disabled persons complaints of not understanding what was occurring will always be cast aside as "general confusion" not worthy of judicial consideration.

With the holding in this case as a reported opinion, the Sixth Circuit has given a specific statement to public entities that they have no duties to train their employees, plan for circumstances when hearing and speech disabled persons are confronted, nor any requirement to modify their polices. Actual discrimination against the disabled will be perpetuated, only this time, it will have a stamp of judicial approval. The noble national mandate of the ADA will truly become a hollow promise. The conflict in the circuits on these issues cannot be permitted to continue. Only this Court has the ability and authority to eliminate the conflict demonstrated, and it is of upmost national importance.

Respectfully submitted,
Odis Tucker, Blake Tucker and Vonnie Tucker, Petitioners

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April 16, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-6208

[Filed January 16, 2009]

ODIS TUCKER, ET AL., Plaintiffs-Appellants,	)
v.	)
STATE OF TENNESSEE, Defendant,	)
HARDIN COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF TENNESSEE, ET AL., Defendants-Appellees.	)

ORDER

BEFORE: KEITH and GRIFFIN, Circuit Judges; and VAN TATENHOVE,* District Judge.

* Hon. Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-6208

[Filed August 29, 2008]

ODIS TUCKER, VONNIE TUCKER, and BLAKE TUCKER, *Plaintiffs-Appellants*,	)
v.	)
STATE OF TENNESSEE, *Defendant*,	)
HARDIN COUNTY, a political subdivision of the State of Tennessee, and SAVANNAH POLICE DEPARTMENT, *Defendants - Appellees.*	)

Appeal from the United States District Court for the Western District of Tennessee at Jackson.
No. 05-01046—James D. Todd, District Judge.

Argued: July 25, 2007

Decided and Filed: August 29, 2008

Before: KEITH and GRIFFIN, Circuit Judges; VAN TATENHOVE, District Judge.*

COUNSEL

ARGUED: William J. Brown, WILLIAM J. BROWN & ASSOCIATES, Cleveland, Tennessee, for Appellants. Jon A. York, PENTECOST & GLENN, Jackson, Tennessee, Dale Conder, Jr., RAINEY, KIZER, REVIERE & BELL, Jackson, Tennessee, for Appellees. **ON BRIEF:** William J. Brown, WILLIAM J. BROWN & ASSOCIATES, Cleveland, Tennessee, for Appellants. Jon A. York, Brandon O. Gibson, PENTECOST & GLENN, Jackson, Tennessee, Dale Conder, Jr., RAINEY, KIZER, REVIERE & BELL, Jackson, Tennessee, for Appellees.

VAN TATENHOVE, D. J., delivered the opinion of the court, in which GRIFFIN, J., joined. KEITH, J. (pp. 15-17), delivered a separate opinion concurring in part and dissenting in part.

OPINION

VAN TATENHOVE, District Judge. The Appellants challenge the district court's grant of summary judgment in favor of two government entities as to their claims for accommodation under the Americans with Disabilities Act at the arrest, post-arrest detention, initial appearance, and

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* The Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

dispositional hearing on their charges. Generally, the district court determined that either the actions at issue were not covered by the ADA and/or that the communication provided was as effective as that available to non-disabled persons. Because we find that the Appellants' rights were not violated, we affirm.[1]

I.

The Tuckers are all deaf and mute, and are related either by marriage or sanguinity. Lauren and Blake are husband and wife. Vonnie is Blake's mother, and Odis his uncle. On Sunday, February 29, 2004, the City of Savannah Police Department ("City Police") received a call regarding a domestic dispute at the home of Donna Spears, Lauren's mother. Blake had driven to Tennessee from Alabama to pick up his wife, Lauren, and their small child from Donna's home. A disagreement arose as to whether Lauren desired to return to Alabama with Blake, and a neighbor phoned the City Police. When they arrived, it became clear that the Tuckers suffered from a hearing and speech impairment. Consequently, the officers utilized a pen and paper to communicate. After these written

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[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the district court's grant of summary judgment was a "final decision." Jurisdiction in the district court was proper under 28 U.S.C. § 1331 because the claims under the ADA raise a federal question.

discussions with Lauren,[2] who initially was reluctant to engage the officers, it appeared the matter was resolved and Lauren would leave Blake.

Although the exact circumstances surrounding their departure are not clear, it appears that Blake got into an altercation with a neighbor, Judy Crotts. One of the officers, Officer Pope, saw Blake strike Ms. Crotts, and push Ms. Spears. Officer Pope then attempted to restrain Blake and place him under arrest. Blake responded by striking Officer Pope. Although Blake disputes that he *intentionally* assaulted Ms. Crotts, he concedes she fell down and started screaming. As for Officer Pope, Blake admits he struck him, but again disputes that it was intentional. After witnessing two assaults, Officer Pope arrested Blake and charged him with resisting arrest, assault, assault on an officer, and disorderly conduct.

Odis apparently came towards the police officers during Blake's arrest with his fists clenched. Consequently, he was also arrested on charges of interference with an officer, disorderly conduct, and resisting arrest.

After their arrests, the City Police transported Blake and Odis to the Hardin County Jail. There, Odis and Blake requested a TDD/TTY telephone to make a phone call. Although the jail did not have the

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[2] The Tuckers claim that Lauren requested an interpreter during this conversation, but to the extent Lauren has forgone any claims, this point is irrelevant here, and further had no impact on the district court's analysis of the remaining Tuckers' claims.

requested technology, the jailers allowed Blake and Odis to phone Vonnie, who talked with them by way of a relay operator. To facilitate effective communication for Blake and Odis, the jailers translated on their behalf through relay operators for over forty-five minutes. Blake and Odis were detained overnight until their initial appearance the following morning.

As was typical for the jurisdiction, those individuals entitled to an initial appearance were placed on the criminal docket. In turn, each case, including the Tuckers', was set and called that morning. Judge Smith, who presided over the proceeding, recognized that Odis and Blake suffered from a hearing impairment. He discerned their impairment based on the sounds they were making and their mannerisms while awaiting arraignment. Accordingly, he moved their proceedings to the end of the docket so that he could communicate more effectively with them because a sign language interpreter was not present that morning. Although the Tuckers claim they requested a sign language interpreter while at the jail, Judge Smith testified that the first time he learned that Odis and Blake were hearing impaired was when they appeared at the Monday morning hearing.

Through a court official, Odis and Blake were provided a written card containing their rights, they nodded their understanding, wrote a plea of "not guilty" on a piece of paper, and Judge Smith released them both on their own recognizance pending further hearing. The matter was then set for hearing on March 19. The state court received notification that an attorney, Rusty Larsen, had been retained to represent Odis and Blake. In a letter to Judge Smith,

Mr. Larsen advised that a sign language interpreter would be "appreciated" for the March 19 hearing. After learning that an interpreter could not be obtained for that particular date, Judge Smith called Mr. Larsen, as counsel for Odis and Blake, and offered to continue the hearing. The Tuckers do not dispute these facts, nor does the record refute them, although Mr. Larsen does not recall the telephone conversation with Judge Smith. The record, however, contains phone records showing the call made from Judge Smith to Mr. Larsen's office.

Further, in his deposition, Mr. Larsen admits that, after consultation with his clients, Blake and Odis decided not to postpone the March 19 hearing because they anticipated entering a guilty plea to the charges against them. Specifically, he testified that he advised his clients that no interpreter would be available at the March 19 hearing, and they declined to request a continuance; rather, they attended with the anticipation that an agreement could be reached regarding the charges. Mr. Larsen testified that he met with his clients on the morning of March 19, in advance of the hearing where they discussed the potential plea, and made the final, voluntary decision to proceed that morning without an interpreter.

Ultimately, the charges against Odis were dismissed in advance of the hearing. Through his counsel, Blake entered a guilty plea to reduced charges and was placed on a diversionary program. During this proceeding, Vonnie voluntarily acted as a translator between Odis, Blake, Mr. Larsen, and the state court. This request was made by Mr. Larsen. Again, the Tuckers do not dispute Mr. Larsen's testimony or the veracity of the chain of events. Instead, they now

claim that they felt that they had no choice but to enter the plea because they did not believe an interpreter would be provided at a subsequent hearing. In addition, they make general allegations of "confusion" regarding the proceedings.

Based on the foregoing, the Tuckers filed this civil rights action against the Appellees. Specifically, Odis and Blake claim that the City Police discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation(s) during their arrest following the domestic disturbance call. Next, Odis and Blake allege that the City Police violated their civil rights by failing to have available and/or provide a TDD/TYY telephone at the jail where Odis and Blake were detained pending an initial appearance. Finally, Odis and Blake claim that Hardin County violated the ADA when the state court judge failed to provide a sign language interpreter at either the initial appearance or the dispositional hearing on the criminal charges asserted against them in state court. Vonnie asserts that the state court judge's use of her services as an interpreter during the dispositional hearing likewise violated her civil rights under the ADA. Both Hardin County and the City Police moved for summary judgment on all claims, and these motions were granted.

The district court concluded that Vonnie's claim against Hardin County failed because she *voluntarily* served as an interpreter at the dispositional hearing on Odis and Blake's criminal charges. Her service was requested in light of her sign language skills and not for any discriminatory purpose. The lower court disposed of Blake and Odis' claims in accordance with

the temporal event upon which they claimed discrimination.

With respect to the arrest, the district court held that the City Police, in arresting Blake and Odis, were not performing a "service, program, or activity" to which the ADA applied, or that even if they were, any denial was not intentionally because of their disabilities. The opinion relied on the rationale of other jurisdictions holding that, in such a context, the "arrest" was not the type of activity covered by the ADA. Although not explicitly held, it appears the court reasoned that, even if the ADA applied to the arrest, there was no intentional discrimination based on their hearing impairment.

By separate order, the district court reached two conclusions regarding the post-arrest detention at the jail. First, the court concluded that the brief detention was not a "service, activity, or program" within the meaning of the ADA. Second, it reasoned that even if the detention was covered by the ADA, Odis and Blake failed to show any injury resulting from the use of the relay operator and that the jail accommodated Odis and Blake in a manner that resulted in communication that was as effective as that received by non-disabled persons.

Next, the lower court concluded that, at the arraignment, Odis and Blake received the same benefits of an "initial appearance" under Tennessee law as those afforded to non-disabled persons, despite the unavailability of a sign language interpreter. Accordingly, no ADA violation occurred.

Finally, the district court held that Odis did not have standing to assert ADA claims related to the dispositional hearing given that the charges were dropped against him and he did not participate in it. As for Blake, the court relied heavily on the fact that he, with the advice of counsel, declined a continuance, and chose to attend the hearing and plead guilty knowing that an interpreter would not be present, but could be available at a later date without detriment to him. Admittedly, Blake had the right to an interpreter, but the court held he could not sue on that right once he refused the accommodation.

Each of these findings are challenged as error, and the Tuckers appeal the grants of summary judgment by the district court. Because summary judgment is intrinsically a fact-intensive analysis requiring *de novo* review, we examine the record as did the district court to determine the appropriate application of the ADA at each stage of the criminal process experienced by the Tuckers.

II.

A.

We review legal conclusions *de novo*. Because a grant of summary judgment is made as a matter of law, the district court's grant of summary judgment is reviewed *de novo*. *See DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004); *Thompson v. Williamson County, Tennessee*, 219 F.3d 555, 557 (6th Cir. 2000). In other words, we apply the same standard as that applied by the district court.

Federal Rule of Civil Procedure 56(c) provides that judgment for the moving party is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also Browning v. Dep't of Army*, 436 F.3d 692, 695 (6th Cir. 2006) (citations omitted). While all inferences are drawn in favor of the non-moving party, that party still must present some affirmative evidence supporting its position to defeat an otherwise appropriate motion for summary judgment. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (non-movant must "do more than simply show there is some metaphysical doubt as to the material facts") (citations omitted); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325 (1986). Stated alternatively, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Importantly, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.* 886 F.2d 1472, 1479-1480 (6th Cir. 1989) (citation omitted).

B.

Congress enacted the Americans with Disabilities Act ("ADA") with the noble purpose of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). A person is

disabled under the ADA if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [has] a record of such an impairment; or [is] regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also Tennessee v. Lane*, 541 U.S. 509, 517 (2004); *Thompson v. Williamson County, Tennessee*, 219 F.3d 555, 557 (6th Cir. 2000). Further, it defines a "qualified individual with a disability" ("QID") as one:

> who, with or without reasonable modifications to rules, policies, or practices, the removal of architecture, communication, or transportation barriers or the provision of auxiliary aids and services, *meets the essential eligibility requirements for receipt of services or the participation in programs or activities* provided by a public entity.

42 U.S.C. § 12131(2) (emphasis added). Consequently, we have held that "the discrimination forbidden by Section 12132 must be with regard to services, programs or activities otherwise it would be quite unclear how we would determine if a plaintiff is a QID." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). Of course, we also have concluded that "the phrase 'services, programs, or activities' encompasses virtually everything a public entity does." *Id.*

This is not to say that there are no limits to the obligations imposed by Title II on public entities.[3] First, we have noted that the requirements of Title II are "subject to the bounds of reasonableness." *Id.* Second, the federal regulations that have been promulgated to effectuate compliance by public entities make clear that the duty upon public entities is not absolute. For example, the ADA "does not require a public entity to take any action that it can demonstrate would result in *a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.*" 28 C.F.R. § 35.164 (emphasis added). So, to establish a prima facie case of discrimination under the ADA, a plaintiff must prove that:

> "(1) she has a disability; (2) she is otherwise qualified; and (3) she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability."

Dillery v. City of Sandusky, 398 F.3d 562, 567 (6th Cir. 2005) (citing *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003)). Further, the plaintiff must show that the discrimination was *intentionally* directed toward him or her in particular. *See id.* at 568 ("'[A]cts and omissions which have a disparate impact on disabled persons in general [are] not specific acts of intentional discrimination against [the plaintiff] in particular.'") (citing *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403

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[3] The ADA defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities. *See* 42 U.S.C. § 12131(1).

(10th Cir. 1997)). If the plaintiff meets these requirements, then the burden shifts to the defendant to show that the accommodation provided was either effective,[4] or that the accommodation sought and not provided would have resulted in a fundamental alteration of the procedures or an undue financial or administrative burden. *See e.g.*, *Lane*, 541 U.S. at 532.

In this case, the Tuckers are deaf and mute; therefore, the question becomes whether appropriate axillary aids were provided. Title II defines "auxiliary aids and services" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 42 U.S.C. § 12102(1)(A). Similarly, the enabling regulations provide that "auxiliary aids and services" include, among other things, "[q]ualified interpreters" and "telecommunications devices for deaf persons (TDD's)." 28 C.F.R. § 35.104(1). And, finally,

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[4] (a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

28 C.F.R. § 35.160.

the public entity typically is required to consider the QID's request, "unless it can demonstrate another effective means of communication exists or that use of the means chosen would not be required under § 35.164." *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1082 (11th Cir. 2007) (citing 28 C.F.R. pt. 35, app. A); *see also* 28 C.F.R. § 35.160(b)(2) ("In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.").

As a preliminary matter, we assume, because the parties agree, that the Tuckers are qualified individuals under the ADA. Second, the parties stipulate that the Tuckers have met the first two prongs of the prima facie case of discrimination. Therefore, we need only consider whether each Appellant has established that he or she was *intentionally* "excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program *solely because of* [his or] her disability." *Dillery*, 398 F.3d at 567 (citations omitted) (emphasis added). If we find that each individual has met his or her burden, we must then determine whether these public entities provided a reasonable means of communication that was as effective as those received by non-disabled persons. 28 C.F.R. § 35.160. In addition, there is no ADA violation if the public entity can show that the accommodation requested by the Tuckers would "result in a fundamental alteration in the nature of a service,

program, or activity" or "undue financial and administrative burdens." *See* 28 C.F.R. § 35.164.[5]

1.

Vonnie Tucker asserts that the state court judge's use of her services as an interpreter during the dispositional hearing violated her civil rights under the ADA. The district court concluded that Vonnie's claim against Hardin County failed because she *voluntarily* served as an interpreter at the dispositional hearing on Odis and Blake's criminal charges. Her service was requested in light of her sign language skills and not for any discriminatory purpose. This finding was not in error. The district court correctly concluded that Vonnie was not denied the benefit of any "service, program, or activity" because of her disability. In fact, she provided a service by agreeing to be an interpreter at the dispositional hearing. If she was uncomfortable in such a role, she didn't have to perform it. Further, and most importantly, she performed this role at the request of counsel for the Tuckers and not the state court. Accordingly, she fails to demonstrate any *intentional* discrimination, and thus no cognizable injury. Simply put, she was not personally denied the benefit of anything being provided by Hardin County to her because of her disability.

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[5] The dissent contends that the question of whether an entity may be excused under this provision a "factual one that should be addressed by a jury." Because our decision rests on the reasonableness and effectiveness of the communication actually provided to the Tuckers, we do not address this issue.

2.

Odis and Blake Tucker challenge the grant of summary judgment in favor of the City Police as it relates to their arrest. Odis and Blake claim that the City Police discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation(s) during the domestic disturbance call that resulted in their arrest.[6] The district court found that the City Police, in arresting Blake and Odis, were not performing a "service, program, or activity" to which the ADA applied. Further, it concluded that even if the arrest was an ADA-covered activity, the Tuckers failed to show any intentional denial of benefits solely because of their disabilities.

As an initial matter, the language of the statute does not specifically enumerate whether an "arrest" is a "service, program, or activity" contemplated by the ADA.[7] In determining that it is not, the district court noted the lack of guidance from this circuit, and proceeded to conduct a "fact specific" analysis

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[6] Odis and Blake also allege that the City failed to complete the self-evaluation required under the ADA. Any such failure, if it is exists, is a different cause of action that the one presented here. *See e.g*, 42 U.S.C. § 1983.

[7] Notably, the U.S. Supreme Court has held that state prisons fall within the ADA, however, that opinion does not address the situation, like the one presented here, where officers are conducting an arrest, or an arrestee is being detained pre-arraignment. *See Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 210-211 (1998).

consistent with that of other courts having considered similar facts.

For example, in *Rosen v. Montgomery County, Maryland*, 121 F.3d 154 (4th Cir. 1997), the Court of Appeals for the Fourth Circuit concluded that a drunk driving arrest did not fall within the ambit of the ADA because an arrest was not a service, program, or activity voluntarily provided by the police, or one which the disabled individual could or would voluntarily participate in to achieve some benefit. Specifically, the *Rosen* Court found that the essential eligibility requirements of an arrest assume a voluntariness in their participation that contradicts the very circumstances, and lack of voluntariness, which usually surround an arrest. *Id.* at 157. In other words, a conclusion which finds a person's criminal behavior meets the eligibility requirements implicating the ADA distorts both the language and intent of the statute. *See id.*

The Fourth Circuit went on to consider whether auxiliary aids should have been made available to Rosen during his arrest, and found that such a requirement would impede the ability of the officers to perform their jobs during on-the-spot, in-the-field arrest. *See id.* ("The police do not have to get an interpreter before they can stop and shackle a fleeing bank robber, and they do not have to do so to stop a suspected drunk driver, conduct a field sobriety test, and make an arrest."). The *Rosen* court ultimately concluded that the plaintiff failed to show that the use of auxiliary aids would have changed the events in any way, and further noted that the criminal justice system itself provides adequate protections for an invalid arrest (e.g., suppression of evidence). *See id.* at

157-158; *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999) (finding that arrests often involve and require immediate responses from law enforcement such that the ADA applies to an arrest "only where the arrestee was subjected to discrimination because of his disability").

Although not cited by the district court, the Eleventh Circuit recently considered facts strikingly similar to those here and found no ADA violation. In *Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007), Bircoll, a hearing impaired individual, brought suit against several public entities alleging that they violated the ADA by failing to obtain an interpreter before performing field sobriety tests on the highway subsequent to a DUI stop. In rejecting Bircoll's claims, the appellate court considered the temporal and factual circumstances surrounding the events. The court concluded that such an accommodation, i.e, to wait for an interpreter before performing field tests and making the arrest, was not reasonable given the exigent circumstances presented by a DUI stop, the "on-the-spot judgment required of police," and the public safety concerns inherent in such a stop. *See id.* at 1086. Further, the court found that the communication with Bircoll "was not so ineffective that an oral interpreter was necessary to guarantee that Bircoll was on equal footing with hearing individuals." *See id.* The court noted that while the communication may not have been "perfect," Bircoll was able to understand the officers' directions and perform several of the requested tests.

Likewise, to conclude that an arrest may be an "activity" subject to the ADA does not direct a finding that an interpreter was required here. Each of the

Tuckers must show that he or she was *intentionally* discriminated against *solely because of his or her disability* in the context of that public service, activity, or program, or that reasonable accommodations were not made to provide them with communications that were as effective as those provided to non-disabled persons. *See Dillery*, 398 F.3d at 567-568 (citations omitted); *Bircoll*, 480 F.3d at 1085 (noting that the ADA prevents discrimination in all contexts regardless of the presence of a "program, service, or activity"). Assuming all facts in their favor, we believe Odis and Blake fail to meet this burden given the undisputed material facts in the record.

First, neither appellant in this case makes any claim of intentional discrimination as it relates to the arrest. Neither Odis nor Blake challenge the validity of the arrest or the facts supporting it. Odis was placed on pretrial diversion for the charges, and Blake ultimately plead guilty. The City Police were called to a domestic disturbance by a neighbor, Judy Crotts. The record contains no evidence that Ms. Crotts advised of the Tuckers' hearing impairment as part of that call. Once the officers arrived, the situation appeared under control, but subsequently escalated as often happens when familial dynamics are involved. The Tuckers allude to discord between Lauren's mother and Blake, and suggest that she intentionally "created" this situation to keep her daughter and granddaughter from leaving with Blake because she had the ability to speak and hear without impairment. Regardless of the motives of Ms. Spears, there is no dispute that one of the officers observed Blake assault the neighbor, Ms. Judy Crotts. Undoubtedly, this constitutes an unanticipated situation which arose after the officers arrived, but one for which they must

be able to respond immediately. Then, Blake admittedly struck one of the officers, and again, necessitated an immediate response. Likewise, Odis attempted to stop the police in their efforts to arrest Blake by running towards the officers flailing his arms. Both Odis and Blake were restrained and placed under arrest without an interpreter being present. The Tuckers were arrested because they assaulted police officers, individual citizens, or attempted to interfere with a lawful arrest and not because they were disabled. *See e.g., Thompson v. Williamson County, Tennessee*, 219 F.3d 555, 558 (6th Cir. 2000) (finding no ADA violation where claimant was denied medical treatment initially because he had to be disarmed by police not because he was mentally disabled). Applying this rationale to the instant facts, we affirm the district court and find no ADA violation.

The Tuckers rest the remainder of their argument on the failure of the City Police to provide effective communication because of a lack of interpreter, but both concede that the officers were effectively communicating with them. Had the situation remained controlled, the officers were communicating effectively with all parties by using a pen and paper. Next, the Tuckers claim that the City Police failed to advise them of their policy of making sign language interpreters available and that they did not do so, even after the Tuckers requested one. There is no evidence that the provision of auxiliary aids, i.e., a sign language interpreter would have changed the events in any way. *See Rosen,* 121 F.3d at 157-158. Nothing about the aforementioned situation suggests the police could have been prepared for the responses which were required of them, or that the circumstances permitted taking the time to obtain a sign language interpreter.

Where, as it occurred in this case, officers are presented with exigent or unexpected circumstances, it would be unreasonable to require certain accommodations be made in light of the overriding public safety concerns. *See e.g.*, *Patrice*, 43 F. Supp. 2d at 1160 ("forestalling all police activity until an interpreter can be located to aid communication with the deaf protagonist would be impractical and could jeopardize the police's ability to act in time to stop a fleeing suspect, physically control the situation, or interview witnesses on the scene."). Further, we rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent with that expectation, and impedes their ability to perform their duties.

In sum, the Tuckers' generalized claims that they were arrested because of a miscommunication, if any, goes to the merits of the arrest[8] and not the reasonableness of the accommodations made by the officers. Accordingly, even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against Blake or Odis Tucker because of the their disabilities in violation of the ADA.

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[8] We agree that the criminal justice system itself provides adequate protections for an invalid arrest (e.g., suppression of evidence), without implicating a violation of the ADA in this context. Notably, the federal regulations provide that Title II does not "invalidate or limit the remedies, rights, and procedures of any other Federal law, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them." 28 C.F.R. § 35.103(b).

3.

Odis and Blake also challenge the district court's finding regarding their claims against Hardin County during their post-arrest detention at the Hardin County Jail. The jail did not have a TTY phone, and Odis and Blake claim that this failure constitutes discrimination against them under the ADA because they were "booked" without first being permitted to make a phone call in the manner they requested. The district court found in favor of the jail on two alternative grounds: (1) if the detention was covered by the ADA, Odis and Blake failed to show any injury resulted from the use of the jailers to make their phone call from the jail rather than provide a TTY telephone, and (2) that the jail had made good faith efforts to accommodate Odis and Blake in a manner that resulted in communication that was as effective as that received by non-disabled persons. We agree.

Again, the Eleventh Circuit's decision in *Bircoll v. Miami-Dade County* is instructive. Bircoll, a deaf arrestee, also challenged the lack of TDD telephones at the jail during his post-arrest detention as violating the ADA. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1087 (11th Cir. 2007). In rejecting the proposition, the court held that the failure of the jail to have the requested TDD phones did not violate the ADA. There, the police officers acted as relay operators so that Bircoll could telephone his girlfriend, and noted that he made calls using the regular phone and left messages in hopes that they would be heard. *See id.* at 1088. Because Bircoll showed no injury, i.e., a failure to effectively communicate, there was no ADA violation.

As an initial matter in this case, we find that the ADA applies to the post-arrest detention at the jail, and note that the parties have stipulated that the Tuckers are qualified individuals. Upon review, however, we conclude that the Tuckers were not *intentionally* discriminated against because of their hearing impairment. Although the jail did not have TTY telephones as standard equipment, Blake and Odis were provided an effective means of communication with relay operators, and permitted to make a phone call. In fact, the phone call lasted nearly forty-five minutes. In essence, the Tuckers, and the dissent, ask this Court to find strict liability simply because the jail failed to provide exactly the auxiliary device they requested - a TTY phone. This is not the law nor do we make it so today.

After their arrest, Blake and Odis were transported to the jail late on a Sunday evening. Once they arrived, they were permitted to make a phone call. Blake and Odis allege that their rights were violated when they were "booked" without first being permitted to make that call. Tennessee Code Ann. § 24-1-211(b)(3) requires that an arrestee be permitted to make a phone call before being "booked" or having their name written down. First, any failure to comply with this statute does not create a cognizable injury under federal law. We have specifically held that this particular Tennessee statute "creates neither a federally protected liberty or property interest." *See Harrill v. Blount County*, 55 F.3d 1123, 1125 (6th Cir. 1995). Nonetheless, we consider the Tuckers claims under the ADA framework.

Blake and Tucker were permitted to make a phone call, although the record is not clear as to when this

occurred in the "booking" process. In any event, if the jail failed to permit the phone call prior to booking these particular individuals, there is no evidence in the record to show that the denial was intentionally discriminatory as required to sustain an ADA claim. To the contrary, any delay appears to have been in an effort to find an accommodation for them to ensure they were able to communicate as effectively as non-disabled persons. Then, the jailers assisted the Tuckers in making their requested phone call by utilizing relay operators, and did so for approximately forty-five minutes. To the extent the Tuckers feel their due process rights were violated under the Tennessee Code because they may not have been able to make the call before they were officially "booked," that presents a different cause of action than one under the ADA.

Moreover, since both Blake and Odis were permitted to make a phone call, they were not denied a service or activity at all. In other words, we conclude that reasonable accommodations were made on their behalf. The chief complaint is that the specific auxiliary equipment requested was not available and this failure was intentionally discriminatory. Here, the Tuckers arrived late Sunday evening, and the jailers did not anticipate the arrival of Blake and Odis at the jail. Therefore, the failure to provide or have a TTY phone was not intentionally done in an attempt to discriminate against either of them *because* of their disability, or deprive them of a service that other detainees without a disability would receive. In fact, the jail made more than reasonable efforts to accommodate their disability once they were made aware of it by aiding them in their phone call and providing communication as effective as that provided to non-disabled persons. Nor we assume, as does the

dissent, that the jailers were not up to the task. Moreover, the Tuckers cite no authority that the phone call had to be private. In fact, calls made from a jail or other like institution are often monitored by prison officials. Therefore, giving the Tuckers every factual benefit of the doubt, the presence of the jailers during the call had no effect on the Tuckers' rights or opportunities that would be different than that provided to non-disabled persons.

As noted, the Tuckers claim they requested a TTY phone, and allege that the lack of these phones at the jail constitutes a violation of their rights under the ADA. In support, they reference the Department of Justice ("DOJ") website, where in its question and answer section, there are comments regarding the Department's interpretation of the ADA enabling regulations regarding the required accommodations for qualified individuals. But again, after reviewing the record in the light most favorable to the Tuckers, we conclude that they received communication opportunities as effective as those provided to non-disabled persons.

Without conceding that the DOJ comments are binding, the DOJ provision cited by the Tuckers notes that "Arrestees who are deaf or hard of hearing *may* require a TDD/TYY devise for making outgoing calls." The commentary only suggests that those specific auxiliary devices may be required. It does not mandate their presence. In fact, the enabling regulations themselves note only that the communication must be as effective as that provided to non-disabled persons, and that the requested device should be considered. *See* 28 C.F.R. § 35.160. It does not require that every potential auxiliary device be on

standby so that whatever request a particular individual makes can be accommodated. The dissent contends that, in light of the definition provided for auxiliary aids, the assistance the jailers provided by way of the relay operators denied the Tuckers a "qualified" interpreter or appropriate auxiliary aid required by the regulations. This argument both overstates the requirements of the ADA and the literal language of the statute itself. Title II specifically states that an entity must provide "auxiliary aids and services" which include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 42 U.S.C. § 12102(1)(A). While the enabling regulations note what items and services may meet this definition, it is not an exhaustive or exclusive list. *See* 28 C.F.R. § 35.104(1) ("auxiliary aids and services" include, among other things "qualified interpreters" and/or "telecommunications devices for deaf persons (TDD's)"). In fact, to hold as the dissent suggests and require the provision of the specific accommodation required, undermines any consideration of the "reasonableness" or "effectiveness" of the actual communication provided in a given circumstance if the aid provided was not one of those listed in the regulation. We decline to expand the language and requirements of the ADA this far.

Rather, the judicial inquiry is more appropriately on the effectiveness of the communication actually received to ensure that the disabled person receives equal opportunities. *See e.g.*, *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1088 (11th Cir. 2007). To this end, neither Blake nor Odis allege a concrete injury as a result of the provided accommodation by the jail, or argue that it was not effective in this circumstance,

but rather complain generally about the lack of a specific accommodation in the form of the TTY phone. This general allegation is insufficient to establish a claim under the ADA in the Sixth Circuit:

> The failure of Sandusky to install handicapped-accessible sidewalks and to train its employees about the ADA affects all disabled persons, not just Dillery. Thus, Dillery cannot demonstrate that Sandusky intentionally discriminated against her specifically by failing to undertake these actions. "[A]cts and omissions which have a disparate impact on disabled persons in general [are] not specific acts of intentional discrimination against [the plaintiff] in particular."

Dillery v. City of Sandusky, 398 F.3d 562, 568 (6th Cir. 2005) (citing *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997). While we certainly recognize that the accommodation provided to the Tuckers is not ideal, that alone does not make it unreasonable or a violation of the ADA under these facts. *See e.g.*, *Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003) (holding that the specific request made by plaintiff was not required as long as a reasonable accommodation was made). The dissent correctly notes that the determination here is one of fact, and we do not suggest otherwise. As is always the case in the summary judgment context, the district court assumes the facts in favor of the non-moving party and determines whether a material fact exists to create a question appropriate for submission to a jury. This is different than concluding that every factual question requires a jury determination. We rest our decision on these facts. We conclude that the jail did not

intentionally discriminate against the Tuckers by failing to have a TTY phone as standard equipment, and further, that the accommodation provided to them was not only reasonable under the circumstances, but allowed them a means of communication that was as effective as that provided to non-disabled persons. Accordingly, the district court did not err in granting summary judgment in favor of Hardin County.

4.

The district court concluded that Hardin County was not liable for failing to provide a sign language interpreter at the initial appearance because Odis and Blake received the same benefits of an "initial appearance" under Tennessee law as those afforded to non-disabled persons, despite the unavailability of an interpreter. Again, on these facts, this finding was not error.

We continue to accept the stipulation that these parties are qualified individuals under the ADA, agree that the ADA applies to court proceedings, and that an interpreter shall be provided to aid criminal defendants in effective communication with the courts. *See e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 532 (2004). (citations omitted); *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). The question before the district court, and now us, however, is whether the Tuckers suffered intentional discrimination because of their disabilities, and whether reasonable accommodations were provided that allowed them to have communications as effective as non-disabled persons.

The Tuckers rely primarily on Tenn. Code. Ann. § 24-1-211(b)(1) which requires a court to appoint a sign language interpreter in any proceeding in which a deaf person is a defendant. While true, this provision also requires the deaf person to notify the court of the need and make a request for an interpreter from the state court. *See id.* at § 24-1-211(c). Although Blake and Odis claim they made this request at the jail the previous night, there is no evidence on the record before us that they repeated this request at their initial appearance the following morning. Even if the Tuckers made this request of the jailers, absent evidence that this information was communicated to the state court, we cannot hold the court liable for any failure of the jail to relay the information. This is particularly true when it does not appear that the Tuckers themselves made the court aware. Accordingly, it is difficult for us to conclude that the failure of the state court judge to provide one is evidence of intentional discrimination because of their disability. In fact, the evidence shows that, despite their disability and the unavailability of a sign language interpreter, the state court judge made every effort to ensure effective communications for Blake and Odis in accordance with the ADA.

Having concluded that the Tuckers were not denied the opportunity for a service, program or activity because of their disability, we turn to whether they received communication as effective as non-disabled persons. At an initial appearance, a criminal defendant is entitled to three things: (1) opportunity to enter a plea; (2) receive a trial date; and (3) be physically present. Tenn. R. Crim. P. 5, 43. It is beyond dispute that both Odis and Blake Tucker received all of these benefits at their initial

appearance. They claim, however, that they did not understand the proceedings and were not properly advised of their rights. These claims, however, are belied by the undisputed evidence. Upon determining that Blake and Odis were hearing impaired based on the sounds they were making in the courtroom during the initial appearance, the judge sent a hand-written note advising that he would move their case to the end of the docket so that he could spend more time with them. At that point, rather than delay their initial appearance and bond hearing, the state court judge communicated with the Tuckers through written notes by way of a court official. Odis and Blake were provided a written card containing their rights, they nodded their understanding, wrote a plea of "not guilty" on a piece of paper, and were provided a trial date. Notably, the Tuckers did not write any request for an interpreter on this note, or any other information which could be construed as a request for an accommodation which was not provided. Based upon these undisputed facts, it cannot be said that Hardin County, through its state court, intentionally discriminated against these individuals because of their disability, or that they did not receive reasonable accommodations which allowed them communication as effective as a non-disabled person.

Had Blake and Odis truly not understood their rights or the fact that they had an opportunity to enter a plea, or been able to effectively communicate, why did they write a "not guilty" plea on a card provided to them? Would Blake and Odis not have entered this same plea had an interpreter been available? Why did they not request an interpreter as part of their written communication with the court? Thus, it is not clear that Blake and Odis even requested, of the court, an

interpreter for this hearing. Even if true, the request to the jail does equate to a request of the court, nor does a failure of the jail to relay this request impute liability to the court if one was not provided. Blake and Odis could have made this request to the court at the initial hearing, or made some effort to communicate this necessity to the court. Instead of entering their "not guilty" plea, they could have written a note requesting an interpreter. They did not. Even still, while a public entity should take a disabled person's requests into account when providing alternative communications, it is not required to meet those exact requests. What is required by the ADA – and what the state court provided in this case – is an alternative which allows disabled persons to communicate as effectively as a non-disabled person. *See* 28 C.F.R. § 35.160.

5.

Finally, the failure to procure an interpreter in advance of the hearing was not intentional discrimination against the Tuckers solely because of their disability. In fact, had the court waited for an interpreter, it is possible that Blake and Odis would have been detained longer before any determination on their bond. Surely this not the result the Tuckers seek, or what the law requires.

Next, Blake and Odis claim that the district court incorrectly concluded that the failure to provide a sign language interpreter at the dispositional hearing violated their rights under the ADA. Specifically, the district court held that Odis did not have standing to assert ADA claims related to the dispositional hearing given that the charges were dropped against him and

he did not participate in it. We agree. As for Blake, the court found no ADA violation relying primarily on the fact that Blake, with the advice of counsel, declined a continuance, and chose to attend the hearing and plead guilty knowing that an interpreter would not be present until a later date. This is correct as well.

Although the regulations require that persons with disabilities be provided the option of declining an accommodation, *see Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 602 (1999), it only stands to reason that the disabled person cannot thereafter sue for an entity's failure to provide such an accommodation. *See Partelow v. Massachusetts*, 442 F. Supp. 2d 41, 49 (D. Mass. 2006) ("Of course, when a plaintiff exercises his statutory right to refuse an accommodation, a defendant may point to that refusal in rebutting the plaintiff's ADA or RA claims.'") (citations omitted).

In this case, Blake had the right to an interpreter at a dispositional hearing, but declined to continue the proceeding to the date when one would be provided. Blake and Odis had retained legal counsel, who advised them of their rights, and who knew an interpreter would not be available on the March 19 date. The state court judge offered to continue the hearing until such time as one could be available. The Tuckers, through their counsel and with his advice, declined this offer. Blake then entered into the plea in a knowing and voluntary way. He himself testified that he knew what he was doing, considered the benefits and burdens of a plea, and made an informed decision to go forward. Blake entered a guilty plea to reduced charges and was placed on a diversionary program. The Tuckers do not dispute this chain of

events, but challenge the district court's ruling because they felt that they had no choice but to enter the plea because they did not believe an interpreter would be provided at a subsequent hearing.

In addition, they make general allegations of "confusion" regarding the proceedings. These allegations are belied, however, by Blake's own testimony that he understood the effect of the plea and that it had been explained to him by his retained counsel, Mr. Larsen. In fact, Blake provided detailed deposition testimony regarding the decision-making process he went through regarding the "pros and cons" of entering a guilty plea. Likewise, they voluntarily went forward knowing Vonnie would be the interpreter, and in fact, requested she do so. All evidence in the record demonstrates conscious decisions by Blake Tucker with full knowledge that he had been offered other options. His own subjective disbelief that an interpreter would not be provided is insufficient to establish a cause of action under the ADA and does not create a genuine issue of material fact to overcome summary judgment.

III.

For these reasons, we AFFIRM.

CONCURRING IN PART, DISSENTING IN PART

KEITH, Circuit Judge, concurring in part, and dissenting in part. While I concur with the majority concerning most of the claims brought by the plaintiffs in this case, I cannot agree that summary judgment is appropriate for determining whether Hardin County violated the ADA by denying Plaintiffs Blake and Odis Tucker the equal opportunity to a phone call after their arrests.

The Tuckers are deaf and mute, and the question regarding their post-arrest treatment is straightforward: Whether Hardin County may, under the ADA, use jail officials to carry out the phone call guaranteed to the Tuckers by Tennessee law, rather than providing an acceptable auxiliary device? To dismiss this complaint without allowing a reasonable jury to address this question is entirely premature.

Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this determination, we draw all inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

There are two genuine disputes of material fact that support denial of Hardin County's claim at the summary judgment stage: (1) whether the accommodation provided to the Tuckers was adequate; and (2) whether providing an acceptable auxiliary telecommunication device for the deaf ("TDD"), such as a teletypewriter ("TTY") phone, would cause Hardin County undue hardship.

I. Whether Hardin County provided an adequate auxiliary aid or service

The ADA demands that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). This protection extends to those detained in a county jail. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) ("State prisons fall squarely within the statutory definition of 'public entity.'"). The ADA also requires public entities to provide accommodations that allow disabled individuals to enjoy the same services provided to non-disabled persons. Pursuant to the Department of Justice's Regulation, 28 C.F.R. § 35.160(b)(1), "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an *equal opportunity* to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." (emphasis added). "In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." *Id.* at

§ 35.160(b)(2). The definition of auxiliary aids includes:

> Qualified interpreters, note takers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

28 C.F.R. § 35.104(1).

The Department of Justice has further clarified the meaning of this policy in its answers to "Commonly Asked Questions About the Americans With Disabilities Act and Law Enforcement," stating:

> Arrestees who are deaf or hard of hearing, or who have speech disabilities, may require a TDD for making outgoing calls. TDD's must be available to inmates with disabilities *under the same terms and conditions* as telephone privileges are offered to all inmates, and information indicating the availability of the TDD should be provided.[1]

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[1] "Commonly Asked Questions About the Americans With Disabilities Act and Law Enforcement," *available at* http://www.usdoj.gov/crt/ada/q&a_law.htm (emphasis added).

A post-arrest phone call is "a service" under the ADA, and Hardin County provides this service to all non-disabled persons who are arrested.[2] Under Tennessee law:

> [n]o person under arrest by any officer or private citizen shall be named in any book, ledger or any other record until after the person has successfully completed a telephone call to an attorney, relative, minister or any other person that the person shall choose, without undue delay.

T.C.A. § 40-7-106(b). Based on this state-mandated post-arrest service, we must therefore assess whether there are any genuine material issues of fact as to whether Hardin County failed to provide the Tuckers with an "*equal opportunity* to participate in [this] . . . service" by "furnish[ing] appropriate auxiliary aids and services[.]" 28 C.F.R. § 35.160(b)(1) (emphasis added).

There is no question in the record that Hardin County recognized that the Tuckers were deaf and mute and yet consciously decided not to provide a TDD device such as a TTY phone. After they were arrested, the Tuckers requested a TTY device. Although the ADA mandates that "[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities," *id.* at § 35.160(b)(2),

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[2] Interpreting the ADA, this Court has held that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998) (quoting 42 U.S.C. § 12132).

Hardin County failed to provide a TTY device or even any of the acceptable auxiliary aids listed under 28 C.F.R. § 35.104(1). In fact, in the ten years following the ADA's mandate, the County failed to acquire any of these accommodations for deaf or mute detainees. Rather than furnishing any of these aids, the County provided what the district court characterized as the "assistance of the jailers," untrained and unqualified prison officials. *Tucker v. Hardin County*, 448 F. Supp.2d 901, 906-07 (W.D. Tenn. 2006).

Title II requires that public entities provide "auxiliary aids and services . . . to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity," 28 C.F.R. § 35.160(b)(1), and there is more than sufficient evidence here that Hardin County may have violated this duty. The majority and the Eleventh Circuit ruling it cites,[3] however, merely gloss over the harms created by Hardin County's approach.

Foremost, it seems highly suspect and potentially very harmful to require deaf and mute detainees to rely on the "assistance of the jailers"—the very officials who placed them under arrest—to carry out the phone call to which these detainees are entitled under Tennessee law. First, there is no guarantee that an untrained officer would be willing or able to communicate with persons who are both deaf and mute effectively enough to express their ideas in the manner they would be conveyed via telephone or TTY call. The regulation defining auxiliary aids includes "*qualified* interpreters, note takers, [and] transcription

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[3] *Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007).

services," and nothing in the record suggests that the officers used to make the phone calls here received any training in communicating with deaf and mute persons. 28 C.F.R. § 35.104(1) (emphasis added).

Second, for the same reason non-disabled detainees are guaranteed opportunities to place phone calls—and are not merely asked to provide jail officials with phone numbers to call on their behalf—a reasonable jury could easily conclude that the ADA requires Hardin County to give deaf and mute detainees an "equal opportunity" to place calls themselves. Just as we are unwilling to excuse the absence of wheelchair ramps in situations in which individuals could be physically carried in and out of buildings, a reasonable jury could find that the ADA does not excuse the absence of TDD accommodations simply because officers offer to make calls on behalf of disabled individuals. And a reasonable jury could also conclude that such an approach might not only be harmful to the Tuckers, but would also seem to undermine the ADA itself.

The assessment of Tuckers' differential treatment versus non-deaf and non-mute detainees and the extent to which they were harmed are genuine issues of material fact. These considerations must be assessed by a jury and are therefore inappropriate for summary judgment.

II. Whether providing a TTY phone would be unduly burdensome

Hardin County may be excused from providing any of the appropriate accommodations required by law if doing so would cause "undue financial and

administrative burden[]," 28 C.F.R. § 35.164. Again, however, this assessment is a factual one that should be addressed by a jury. In a recent case, the Tenth Circuit denied a defendant county's summary judgment motion against a hearing impaired individual's lawsuit for denial of access to a TTY device after his arrest. *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1196 (10th Cir. 2007). Unlike the majority, the Tenth Circuit properly found that the question of whether requiring TTY phones to arrestees causes undue financial and administrative burden "present[ed] a question of fact." *Id.* at 1199.

The TTY device was designed precisely for the purpose the plaintiffs in *Robertson* and this case envision. Despite the availability of such options, Hardin County failed to provide a TTY device or any of the other eleven alternatives mentioned under 28 C.F.R. § 35.104(1). In refusing to require any of these accommodations when they are so obviously necessary and so easily available, the majority takes a step backward in our efforts to uphold the rights of disabled individuals guaranteed by the ADA. While my colleagues may disagree on the question of whether using an officer to make a post-arrest call for hearing-impaired or mute detainees is an appropriate "auxiliary aid and service," it is clear that such an assessment is a factual one that is to be addressed by a jury.

For these reasons, I dissent from this portion of the majority's ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-6208

[Filed August 29, 2008]

ODIS TUCKER, VONNIE TUCKER, and BLAKE TUCKER, Plaintiffs-Appellants,	)
v.	)
STATE OF TENNESSEE, Defendant,	)
HARDIN COUNTY, a political subdivision of the State of Tennessee, and SAVANNAH POLICE DEPARTMENT, Defendants - Appellees.	)

Before: KEITH and GRIFFIN, Circuit Judges; VAN TATENHOVE, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Jackson.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgments of the district court are AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX C

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

CASE NUMBER: 05-1046-T/An

[Filed August 15, 2006]

ODIS TUCKER, VONNIE TUCKER, BLAKE TUCKER, and LAUREN TUCKER	)
v.	)
HARDIN COUNTY, and CITY OF SAVANNAH POLICE DEPARTMENT	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in compliance with the order entered in the above-styled matter on 08/02/06, 08/10/06 and 08/14/06, summary judgment is GRANTED as to both defendants, and this case is hereby DISMISSED.

APPROVED:

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

THOMAS M. GOULD
CLERK

BY: s/Emily J. Smith
DEPUTY CLERK

APPENDIX D

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

CASE NUMBER: 05-1046-T/An

[Filed August 15, 2006]

ODIS TUCKER, VONNIE TUCKER, BLAKE TUCKER, and LAUREN TUCKER	)
v.	)
HARDIN COUNTY, and CITY OF SAVANNAH POLICE DEPARTMENT	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in compliance with the order entered in the above-styled matter on 08/10/06 and 08/14/06, summary judgment is GRANTED as to both defendants, and this case is hereby DISMISSED.

APPROVED:

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

THOMAS M. GOULD
CLERK

BY: s/Emily J. Smith
DEPUTY CLERK

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

No. 05-1046-T/An

[Filed August 14, 2006]

ODIS TUCKER, VONNIE TUCKER, BLAKE TUCKER and LAUREN TUCKER, Plaintiffs,	)
VS.	)
STATE OF TENNESSEE; HARDIN COUNTY, TENNESSEE; and CITY OF SAVANNAH POLICE DEPARTMENT, Defendants.	)

ORDER GRANTING SUMMARY JUDGMENT TO CITY OF SAVANNAH POLICE DEPARTMENT

The plaintiffs, Odis Tucker, Vonnie Tucker, Blake Tucker and Lauren Tucker, brought this action pursuant to Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, against the

State of Tennessee, Hardin County, Tennessee[1] and the City of Savannah Police Department.[2] Plaintiffs allege that each of them is a qualified individual with a disability and that the defendants discriminated against them and denied their right to accommodation under the ADA during an incident that occurred on February 29, 2004 and during the ensuing proceedings in Hardin County General Sessions Court. They seek compensatory damages, attorney fees and expenses. Before the Court is a motion for summary judgment filed on behalf of the City of Savannah (the "City").[3] Plaintiffs have filed a response to the motion.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings

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[1] The Court issued an order granting the State of Tennessee's motion to dismiss on August 2, 2005. Summary judgment was granted in favor of Hardin County on August 10, 2006.

[2] The City of Savannah is the appropriate defendant, as the "City of Savannah Police Department" is not a suable entity that is separate from the City itself.

[3] Vonnie Tucker asserted claims only against the State of Tennessee and Hardin County. Therefore, her claims are not addressed in the City's motion.

and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Celotex Corp., 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, the Court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Liberty Lobby, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. See Tennessee v. Lane, 541 U.S. 509, 516-17 (2004). The term "public entity" includes state and local governments, as well as their departments, agencies and instrumentalities. § 12131(1). A "qualified individual with a disability" is defined as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12131(2). In order to establish a prima facie under Title II, a plaintiff must show that he or she (1) has a disability, (2) is otherwise qualified, and (3) is "being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of [his or] her disability." Dillery v. City of Sandusky, 398 F.3d 562, 567 (6th Cir. 2005) (quoting Jones v. City of Monroe, 341 F.3d 474, 477 (6th Cir. 2003)). Compensatory damages may be recovered under the ADA only if the plaintiffs prove intentional discrimination. See Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 126 (1st Cir. 2003); Delano-Pyle v. Victoria County, Tex., 302 F.3d 567, 574 (5th Cir. 2002), *cert. denied*, 540 U.S. 810 (2003); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999); Center v. City of West Carrollton, 227 F. Supp. 2d 863, 871 (S.D. Ohio 2002).

Plaintiffs Odis Tucker ("Odis"), Blake Tucker ("Blake") and Lauren Tucker ("Lauren") are deaf and mute. Blake and Lauren are husband and wife. The evidence in the record shows that, at some point during the evening of Sunday, February 29, 2004, City police officers Mike Pope, John Sylvester and T.J. Barker responded to a possible domestic disturbance call at 90 Canby Circle in Savannah, Tennessee, the home of Lauren mother, Donna Spears ("Donna"). Lauren had been visiting her mother for a few days prior to the incident; she had Kayla Tucker, the infant daughter of Lauren and Blake, with her as well. Odis and Blake arrived in Savannah unexpectedly[4] to pick up Lauren and the baby, intending for all of them to return to their home in Alabama. It is unclear who then called the police, but the parties have speculated that it was one of Donna's neighbors.

Officer Pope was the first to arrive at the scene. He had been called to the 90 Canby Circle address in the past; therefore, he knew Lauren and her mother, and knew Lauren was deaf and mute. When he arrived, Pope saw a maroon van parked on the street and saw Odis and Blake outside using sign language, so he got a pad and a pen in order to communicate with them in writing.[5] Donna, who is not mute or hearing disabled,

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[4] Blake was not supposed to pick Lauren up until the next day, Monday.

[5] Lauren and the baby were at the Shanks' house, a neighbor across the street, when Blake and Odis arrived. Blake walked over to find Lauren, followed by Donna Spears. Donna, Lauren, and Blake, who was carrying the baby, then walked back across the street together to Donna's house. Donna and Lauren went inside, and that seems to have been when Pope arrived on the

came out of her house and told Pope that Lauren did not want to leave with Blake and Odis. Pope instructed Donna to go back inside and then communicated in writing with Blake and Odis. There is disputed testimony regarding the substance of that communication.[6] In any event, Pope then went inside the house to find out what Lauren had to say, telling Blake and Odis to wait outside. At about this time, Officers Sylvester and Barker also arrived on the scene. Barker went inside, while Sylvester stayed outside with Blake and Odis.

Inside the house, Donna repeated the statement that Lauren did not want to leave with Blake. Pope testified that Lauren at first refused to communicate with him in writing, but then agreed to do so if her mother left the room, which she did. (Pope Dep. at 26-27.) Pope stated that Lauren first indicated that she did not want to leave Savannah, but then changed her mind and stated that she would leave with Blake and Odis. Id. at 27.

Lauren testified that she repeatedly asked for an interpreter, but that Pope ignored her requests. She stated that she told Pope she wanted to leave with her husband, but that her mother and Pope then began

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scene. Blake handed the baby to Odis, but neither Blake nor Odis went into Donna's house.

[6] Pope testified in his deposition that Odis wrote that Donna would not let Lauren and the baby leave. (Pope Dep. at 24-25.) However, in his deposition, Blake stated that he told Pope only that he did not know what was going on. (B. Tucker Dep. at 19.) Odis denied exchanging any written communication with the police. (O. Tucker Dep. at 13.)

talking and she could not tell what they were saying. (L. Tucker Dep. at 14-16.) However, regardless of this differing testimony, it is undisputed that when Lauren assured Pope that she wished to leave with Blake and Odis, the officers did not attempt to stop her. Lauren was allowed to gather her things and leave the house, with the officers escorting her to the van.

The testimony of the plaintiffs regarding the events of the next few minutes is very confused. Nevertheless, the plaintiffs do not dispute that at some point Pope believed he saw Blake strike Judy Crotts[7] with his hand or arm. (Pope Dep. at 29-30.) Blake contends that he did not actually strike Ms. Crotts or even touch her, but merely put out his arm to block her from taking the baby out of the van. However, even though Blake contends that she was only pretending, Ms. Crotts did scream and fall down. (B. Tucker Dep. at 30-31, 38-39.) Furthermore, Blake later pleaded guilty to assaulting Ms. Crotts.[8]

Pope testified that he held up his hands for Blake to stop, but Blake hit him in the chest so Pope grabbed his arms in an attempt to subdue him. (Pope Dep. at 30.) Blake admits that he then began to resist the officers and that they struggled with him for quite

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[7] Judy Crotts was a friend of Donna's. It is unclear when she arrived on the scene. Pope testified that she was already in the house while he was talking with Lauren and Donna, and was trying to keep them calm. (Pope Dep. at 28.) However, Lauren testified that Ms. Crotts arrived later, after they all went outside and were getting ready to leave. (L. Tucker Dep. at 22.)

[8] Blake also pleaded guilty to assaulting Pope, and to disorderly conduct. (Def.'s Mot. for Summ. Judg., Ex. 8.)

some time before taking him to the ground. (B. Tucker Dep. at 32-34, 40-42.) Blake also admits that he hit Pope at one point, although he claims it was accidental. Id. at 35-36, 41-42. After finally getting Blake handcuffed, the officers arrested him and placed him in a patrol car. Blake was charged with resisting arrest, simple assault, assault on an officer, and disorderly conduct.

While the officers were struggling with Blake on the ground, Odis approached them from behind. He asserts that he was screaming, trying to tell them not to hit Blake. (O. Tucker Dep. at 27-28). The officers perceived his behavior as a threat, as he was coming toward them in a hostile manner with both fists clenched. Odis retreated slightly when ordered back, but then came at them again, so Pope pulled his weapon and ordered him a second time to get back, which he did. (Pope Dep. at 31-35.) Odis also was arrested, handcuffed and placed in the patrol car with Blake. He was charged with resisting arrest, disorderly conduct, and interfering with an officer. Blake and Odis were transported to the Hardin County Jail where they were kept in custody until their initial appearance the next day.

Officer Barker states in his affidavit that, after Blake and Odis were arrested, Lauren continued to scream and be very upset. He states that he placed Lauren in the back of his patrol car in an effort to calm her down, but did not arrest or handcuff her. (Barker Aff. ¶ 18.) Lauren testified, however, that she was arrested and that she was handcuffed. (L. Tucker Dep. at 24-25.) At approximately 7:29 p.m. Barker drove Lauren less than a mile to the Hardin County Jail, but she was not charged with any offense. Barker states

that the purpose of removing her from the scene was to avoid further conflict between Lauren and her mother. (Barker Aff. ¶¶ 18-19.)

Lauren testified that when they got to the Hardin County Jail, she was put in a room like an office where she sat for a while. She states that she asked for an interpreter. (L. Tucker Dep. at 25.) Barker left the Hardin County Jail with Lauren at approximately 7:59 p.m.[9] He first drove Lauren back to her mother's house to pick up her daughter; however, Barker did not leave her there. Instead, Barker drove Lauren and the baby on to her grandmother's house, where he left her at approximately 8:18 p.m. (Barker Aff. ¶¶ 18-21; L. Tucker Dep. at 26-27.)

Plaintiffs allege that the City discriminated against them in violation of the ADA by failing to provide an effective means of communication during this incident. However, the City contends that an arrest is simply not a service, program or activity to which the ADA applies. That issue appears to be a fact-specific determination. See Catlett v. Jefferson County Corr. Dept., 2000 U.S. Dist. LEXIS 21662, *17 (W.D. Ky. 2000).

It has been held that a deaf plaintiff who was stopped for DUI and alleged that the police made no attempt to effectively communicate with him had no claim under the ADA. Rosen v. Montgomery County,

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[9] Although Lauren testified that she was at the Hardin County Jail for more than an hour, Barker indicated that, from a review of his radio logs, it appears to have been a little less than thirty minutes. (Barker Aff. ¶ 20.)

Md., 121 F.3d 154 (4th Cir. 1997). In that case, the Fourth Circuit stated:

> [Calling] a drunk driving arrest a "program or activity" of the County, the "essential eligibility requirements" of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent. See Gorman v. Bartch, 925 F. Supp. 653, 655 (W.D. Mo. 1996) ("It stretches the statute to talk about the Plaintiff's 'eligibility' to be arrested and taken to jail or to participate in being arrested . . . ."); cf. Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995) ("The terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the State; they do not bring to mind prisoners who are being held against their will."), *cert. denied*, 516 U.S. 1071, 116 S. Ct. 772, 133 L.Ed.2d 724 (1996).
>
> . . . .
>
> . . . . The police do not have to get an interpreter before they can stop and shackle a fleeing bank robber, and they do not have to do so to stop a suspected drunk driver, conduct a field sobriety test, and make an arrest.

Id. at 157-58. Furthermore, in a case where the deaf plaintiff was arrested on domestic violence charges, it was concluded that:

> [F]orestalling all police activity until an interpreter can be located to aid communication with the deaf protagonist would be impractical and could jeopardize the police's ability to act in time to stop a fleeing suspect, physically control

> the situation, or interview witnesses on the scene. The decisions we ask our officers to make under already stressful, and sometimes dangerous, circumstances, should not be subjected to second guessing by comparing their in-the-field actions to the requirements of the ADA.

Patrice v. Murphy, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999).

Plaintiffs argue that this February 29, 2004 incident is not the type of in-the-field action or on-the-street arrest contemplated by these decisions. They contend that the officers listened to Donna and to Ms. Crotts rather than trying to communicate effectively with Odis, Blake and Lauren. It is claimed that the whole situation arose as a result of the officers' failure to obtain an interpreter and that if the officers had only done so, everything would have been resolved peacefully and Odis, Blake, Lauren and the baby would have been able to go home without any difficulty.

Plaintiffs' theory fails to account for the undisputed evidence that the officers were, in fact, allowing Odis, Lauren, Blake and the baby to leave peacefully. Everyone present on the scene had communicated effectively enough to understand that. However, before getting into the van, Blake hit Judy Crotts, knocking her down.[10] That action was the trigger for

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[10] As stated, *supra*, even though Blake contends that he did not touch Ms. Crotts, he pleaded guilty to assaulting both Ms. Crotts and Officer Pope. In addition, Pope clearly believed that he saw

everything else that happened that evening. When the officers attempted to arrest Blake for the assault, Blake admitted that he actively resisted for several minutes and that he hit Pope. While struggling with Blake, the officers perceived Odis as threatening them and attempting to interfere with the arrest. Lauren then was so upset with her mother and the officers that she was temporarily removed from the scene. The contention that none of this would have happened if only an interpreter had been present from the beginning is not supported by the record.

The Court concludes that the plaintiffs have failed to produce evidence that they were denied a "service, program or activity" by the City, or if they were, that it because of their disabilities. Therefore, the City's motion for summary judgment (dkt. #58) is GRANTED. The Clerk is directed to prepare a judgment in accordance with this order and the orders issued on August 2, 2005 and August 10, 2006.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

Blake hit Ms. Crotts. (Pope Dep. at 39-40.) Thus, Pope would have reacted in the same way even if Blake had not been speech and hearing disabled.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

No. 1:05-cv-01046-T/An

[Filed August 10, 2006]

ODIS TUCKER, VONNIE TUCKER, BLAKE TUCKER, and LAUREN TUCKER,

Plaintiff,

VS.

HARDIN COUNTY, and CITY OF SAVANNAH POLICE DEPARTMENT,

Defendant.

ORDER GRANTING DEFENDANT HARDIN COUNTY'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Blake Tucker, Lauren Tucker, Odis Tucker, and Vonnie Tucker, filed this action pursuant to Title II of the Americans with Disabilities ("ADA") of 1990, 42 U.S.C. § 12131 et seq., against the State of Tennessee, its political subdivision, Hardin County, and the City of Savannah Police Department. This

Court dismissed the State of Tennessee as a defendant on August 1, 2005 because the case alleged violations in the Court of General Sessions of Hardin County, for which the State is not accountable. On June 26, 2006, Defendant Hardin County ("Defendant") filed a motion for summary judgment on all claims. Defendant contends that Lauren and Vonnie Tucker fail to state a claim under the ADA, and that the claims of Odis and Blake Tucker should be dismissed because there was no violation under the ADA. In response, Plaintiff noted that Lauren Tucker no longer asserts a claim but that Vonnie Tucker, Odis Tucker, and Blake Tucker continue to seek redress under the ADA. For the reasons that follow, the Court GRANTS summary judgment for Defendant Hardin County on all counts.

Background

Plaintiffs Blake and Odis Tucker, who are both deaf and mute, were arrested on Sunday February 29, 2004. Blake Tucker ("Blake") was charged with resisting arrest, simple assault, assault on an officer, and disorderly conduct. Odis Tucker ("Odis") was charged with resisting arrest, disorderly conduct, and interfering with an officer. The two were brought to the Hardin County jail at 8:25 PM. In accordance with Hardin County procedure when charges involve an assault on an officer, the police called Judge Daniel Smith for a decision on bond. The judge chose to set no bond, and Odis and Blake remained in custody until their initial appearance the next day at 10:00 A.M.

While in custody, Blake and Odis communicated with officers through written notes. The two asked to call Vonnie Tucker ("Vonnie") (who is also hearing impaired), but the jail was not equipped with a

teletypewriter ("TTY") telephone. Instead, the jailers acted as relay operators for Odis and Blake, using paper and pencil, as they spoke with a relay operator acting on Vonnie's behalf to complete the call. The call lasted 45 minutes.

While waiting in the courtroom the next day for their initial appearance the judge noticed that Blake and Odis were communicating with signs. The judge sent a note to Blake and Odis stating that he would save their case for last so that he would have the opportunity to spend more time communicating with them. When they appeared, they entered "not guilty" pleas. The judge scheduled a hearing date for March 19, indicated that an interpreter would be present at the hearing, and released the two pending trial.

On March 11, the Blake and Odis met with their lawyer, Mr. Larson, who informed them that they would need to formally request an interpreter for the trial. On March 15, 2004, Mr. Larson sent notice to the court that an interpreter was required. On March 17, 2004, Mr. Larson was informed that an interpreter was not available for the March 19 court date, and that the hearing would have to be postponed until one could be scheduled. Mr Larson insisted on keeping the March 19 court date, stating that a plea agreement was in the works, and that if a plea agreement was not reached, he would ask for postponement at the hearing.

On the date of the proceeding, March 19, 2004, there was no interpreter available in court. The lawyers did reach a plea agreement, which included the dropping of all charges against Odis Tucker, and a reduction in the charges for Blake Tucker. Mr.

Larson, counsel for Blake, explained the terms of the agreement to Blake before he appeared before the judge. Mr. Larson elected to proceed with the hearing to enter the guilty plea, notwithstanding the lack of a qualified interpreter, and indicated to the court that Blake's mother, Vonnie Tucker, would act as interpreter for the entering of the plea. Blake Tucker, aware that no interpreter was present, proceeded to enter the guilty plea, which the court accepted.

Plaintiffs Lauren, Blake, Vonnie, and Odis Tucker subsequently brought this action alleging discrimination in violation of the Americans with Disibilities Act (ADA) at three times: the detention in the Hardin County Jail, the initial appearance in the Hardin County General Sessions Court, and the dispositional hearing in which Blake Tucker's guilty plea was presented and accepted.

Analysis

Summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure and requires that the moving party show the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). "If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, however. Anderson, 477 U.S.

at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

Congress passed the Americans with Disabilities Act ("ADA") "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Tennessee v. Lane, 541 U.S. 509, 516-517 (2004) (referencing: §§ 12101(b)(1), (b)(4)). Title II of the ADA, §§ 12131-12134, prohibits the discrimination by any public entity[1] against a "qualified" person[2] with a disability in the operation of public services, programs or activities. See id. The enforcement provision of Title II incorporates § 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, which authorizes private citizens to bring suits for money damages. Id. (citing 42 U.S.C. § 12133).

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[1] "Public entity" includes state and local governments, as well as their agencies and instrumentalities. § 12131(1)

[2] A "qualified person" is one who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2)

Within the realm of the judicial system, Title II imposes a "duty to accommodate," consistent with the due process principle that "'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts." Tennessee v. Lane, 541 U.S. 509, 522-523 (U.S. 2004) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971). This does not, however, "require States to employ any and all means to make judicial services accessible to persons with disabilities . . . [i]t requires only 'reasonable modifications'" . . . that would not impose "undue financial or administrative burden." Id. at 531-532.

1. Lauren Tucker's claim

Plaintiff's "Memorandum of Law in Opposition to Defendant Hardin County's Motion for Summary Judgment" states that "Lauren Tucker's (sic) has no claim against Hardin County." Therefore, any pending claim brought by Lauren Tucker against Hardin County is DISMISSED.

2. Vonnie Tucker's claim

Plaintiff Vonnie Tucker ("Vonnie") claims that she was a victim of discrimination under the ADA because she was asked to serve as an interpreter in the hearing at which Blake Tucker's plea agreement was presented. Vonnie contends that she was asked to be an interpreter because she was deaf, and this selection based on disability deprived her of her right to participate as a spectator in the activities of a public entity. Vonnie further claims that she "did not understand what was going on," she was "embarrassed, upset and depressed." (Pl.'s Br. at 18).

The depositions indicate that it was Blake and Odis Tucker's counsel, Mr. Rusty Larson, who enlisted Vonnie to serve as an interpreter, before the court proceedings began. Mr. Larson represented to the court that Ms. Tucker would serve as an interpreter, and Ms. Tucker did not express any reservations to the court indicating an unwillingness to serve as an interpreter for her sons. Furthermore, the request that Vonnie interpret was just that, a request. Regardless of who asked or how she was asked, Vonnie Tucker could have simply said "No."

Even if the court were in some way responsible for the service of Ms. Tucker as an interpreter, it was not a request based on disability, but rather a request based on skill. Ms. Tucker was not asked to be an interpreter because she was hearing impaired, but rather because she was proficient in lipreading and international sign language. Selection based on skill is not prohibited by the ADA. Vonnie Tucker has not stated a claim upon which relief can be granted under the ADA. For this reason, Defendant's motion for summary judgment on Vonnie Tucker's claim is GRANTED.

3. Blake and Odis Tucker's claims

Blake and Odis Tucker claim discrimination at three times: during their post-arrest detention, at their initial appearance, and at the hearing in which Blake Tucker's plea agreement was presented and accepted.

A. Post-Arrest Detention

Blake and Odis Tucker allege that the conditions surrounding their detention and phone call to Vonnie

Tucker denied them benefits to which they were entitled. Defendant Hardin County argues that the ADA should not be applied to the less-than-24-hour detention of Odis and Blake Tucker following their arrest because the detention is not a "service, program or activity" of a public entity. Some circuits have chosen to specifically hold that brief detentions are not a "service, program, or activity" for purposes of the ADA.[3] Though not directly addressing brief post-arrest detentions, the Sixth Circuit has interpreted the phrase broadly, stating that "services, programs, or activities . . encompass virtually everything that a public entity does." Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998). The Court assumes that the Sixth Circuit's broad reading of the statute's language indicates that overnight incarceration is covered by Title II of the ADA, and proceeds to analyze Plaintiff's claims under the Act.

Congress charged the Justice Department with establishing regulations for the implementation of the ADA, and these regulations are instructive in the present analysis. See: Henrietta D. v. Bloomberg, 331 F.3d 261, 274 (2d Cir. 2003) and Olmstead v. L.C., 527

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[3] See: Rosen v. Montgomery County, 121 F.3d 154 (4th Cir. 1997) (DUI stop, arrest, and stationhouse detention of a hearing impaired person was not a "program or activity" under the ADA); Patrice v. Murphy, 43 F. Supp. 2d 1156 (W.D. Wash. 1999) (Domestic violence arrest of a hearing impaired person not subject to the ADA); Bircoll v. Miami-Dade County, 410 F. Supp. 2d 1280, 1285 (D. Fla. 2006) (Brief detention of hearing impaired person and denial of access to TTY was not violation of ADA); Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) ("Incarceration, which requires the provision of a place to sleep, is not a 'program' or 'activity'").

U.S. 581, 598 (1999) (stating that Justice Department regulations for implementation of the ADA "warrant respect."). Section 28 CFR 35.130(b)(1)(iii) prohibits public entities from "provid[ing] a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."

Even assuming *arguendo* that placing a phone call is an "aid, benefit, or service" within the regulation, no evidence has been produced by Plaintiffs that Blake and Odis Tucker were prevented from gaining the same benefit as non-disabled persons from using the telephone, albeit with the assistance of the jailers. Plaintiffs do not cite any adverse effects associated with having to employ the jailers as relay operators for their call, which the jailers voluntarily did for 45 minutes. Information was transmitted and received, which is the same benefit a non-disabled person would have received from using the jail's telephone. Because there is no apparent injury and because defendants made good faith efforts to accommodate plaintiffs, the allegations of discrimination under the ADA during the post-arrest detention fail.

B. Initial Appearance

Title II of the ADA creates an "affirmative obligation to accommodate persons with disabilities in the administration of justice." Tennessee v. Lane, 541 U.S. at 532 With this mandate, and the broad reading of the ADA term "service, program or activity," employed by the Sixth Circuit (See: Johnson, supra), this Court finds that the ADA is applicable to court

proceedings such as the initial appearance at issue in this case. The court then turns to the question of whether the absence of an interpreter at the initial appearance for Blake and Odis Tucker denied them "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 CFR 35.130(b)(1)(iii).

Initial appearances are governed by Tennessee Rule of Criminal Procedure 5, which provides that, upon a plea of not guilty, that a preliminary examination is to be scheduled, within ten days if the defendant remains in custody and within thirty days if released. Tenn. Crim. Proc. Rule 5 (2006). The only other procedural consideration is the Rule 43 requirement that the defendant be present. Tenn. Crim. Proc. Rule 43 (2006). Therefore, the "benefits" of an initial appearance under Tennessee law are 1) the opportunity to enter a plea; 2) the scheduling of a trial; and 3) a defendant's opportunity to be present.

In the present case, both Odis and Blake Tucker 1) entered pleas of "not guilty," 2) received a trial date; and 3) were present. Plaintiffs present no argument that the outcome was any different than it would have been if an interpreter was provided; and there is no evidence that they did not gain the same benefit provided to others. Viewing all of the evidence in the light most favorable for the Plaintiffs, no reasonable jury could find that Plaintiffs were denied equal opportunity to gain the same benefits as others. For this reason, Blake and Odis Tucker's claims of discrimination under the ADA at the initial appearance fail.

C. Dispositional Hearing

Both Odis Tucker and Blake Tucker assert that Defendant violated the ADA because an interpreter was not provided at the March 19, 2004 dispositional hearing in which Blake Tucker's guilty plea was accepted by the court. The charges were dropped against Odis Tucker, however, and because Odis Tucker did not appear in the dispositional hearing, he does not have standing to raise an ADA claim arising out of the March 19, 2004 hearing. The court therefore, GRANTS Defendant's motion for summary judgment on Odis Tucker's claim, and considers the remaining claim by Blake Tucker.

As noted above, this Court recognizes that the ADA is applicable to court proceedings. See supra. Additionally, Tennessee statute T.C.A. § 24-1-211 requires that a qualified interpreter be present when a deaf person is the subject of court proceedings. In this case, however, the court informed Rusty Larson, counsel for Blake and Odis Tucker, that an interpreter would not be available on March 19, 2004, and that the hearing date should be changed in order for an interpreter to be present. Mr. Larson elected to keep the original hearing date, in anticipation that a plea agreement would be reached. Blake Tucker stated in his deposition that his attorney never informed them that an interpreter was unavailable and that the court had suggested the continuance until an interpreter was present. The court, however, does not manage the communications between the lawyer and client. Under Rule 1.2 of the Model Rules of Professional Responsibility, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation, but the lawyer is obliged to

communicate with the client and abide by the client's decisions concerning representation.

In this case, an offer of accommodation was made by the court to Odis and Blake Tuckers' counsel, and was not accepted. A disabled person has the right to refuse an accommodation, but cannot then sue for denial of that accommodation. See: Partelow v. Massachusetts, 2006 U.S. Dist. LEXIS 42463 (D. Mass. 2006) (citing Clay v. Hernandez, 360 F. Supp. 2d 595, 634 (S.D.N.Y. 2005) ("Department of Justice regulations make it quite clear that a public entity is not empowered to require a person to accept any particular accommodations"); Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 602 (1999) ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation.")). In this case, the denial of an accommodation made by Blake Tucker's counsel is attributed to Blake Tucker because of the client-counsel duty under the rules of professional responsibility.

The plaintiffs' brief also appears to make an argument that Blake Tucker was not made fully aware of the provisions of his guilty plea, though it was explained to him by his lawyer, he signed a written agreement, and indicated that he understood when asked at the hearing. Plaintiff's brief states that it is "the Judge's statutory and constitutional duty to inform the Plaintiffs in their role as defendants in a criminal proceeding as to the nature of the charges and their rights and to make an inquiry as to whether they are freely and voluntarily giving up those rights" (Pl.'s Br. p. 18, quoting T.R.Crim.P 5(c)(1); State v. Mackey, 553 S.W.2d 337 (Tenn. 1997). This point would be germane if Plaintiff were asserting a due process

claim, but in the context of allegations of ADA violations, are irrelevant.

With regard to Blake Tucker's claim of discrimination at the dispositional hearing on March 19, 2004, the evidence taken in the light most favorable to the plaintiff shows that the court made an offer of accommodation, which the plaintiff, through counsel, refused. If the communication between lawyer and client was not handled appropriately then Blake Tucker's claim is against his attorney, not against the court. This claim also fails.

Conclusion

For the foregoing reasons, Defendant Hardin County's motion for summary judgment on all claims is GRANTED.

IT IS SO ORDERED.

s/James D. Todd

JAMES D. TODD

UNITED STATES DISTRICT JUDGE

August 10, 2006
DATE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

No. 05-01046-T/An

[Filed August 2, 2005]

ODIS TUCKER, VONNIE TUCKER, BLAKE TUCKER, and LAUREN TUCKER,	)
Plaintiff,	)
VS.	)
STATE OF TENNESSEE, its political subdivision, HARDIN COUNTY, and CITY OF SAVANNAH POLICE DEPARTMENT,	)
Defendant.	)

ORDER GRANTING DEFENDANT STATE OF TENNESSEE'S MOTION TO DISMISS

The plaintiffs, Odis Tucker, Vonnie Tucker, Blake Tucker, and Lauren Tucker, filed this action pursuant to Title II of the Americans with Disability Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq*., against the State of Tennessee, its political subdivision, Hardin County, and the City of Savannah Police Department. Before

the court is Defendant State of Tennessee's motion to dismiss. Plaintiffs have responded to the motion.

Plaintiffs allege that the Defendant State of Tennessee discriminated against them by failing to provide a sign language interpreter at a hearing before a general sessions judge. More specifically, plaintiffs contend that the Hardin County General Sessions Judge and the assistant district attorney for the State of Tennessee denied plaintiffs' request for accommodation in violation of the ADA. Plaintiffs seek to hold defendant liable for the actions of both the sessions judge and the assistant district attorney. Defendant contends that it is not responsible for the actions or inactions of the Hardin County General Sessions Court and that the sessions judge, not the assistant district attorney, had the responsibility to provide a sign language interpreter the plaintiffs' hearing.

The United States Supreme Court has outlined two guiding principles in determining whether a state or county is responsible for an official for the purpose of liability under 42 U.S.C. § 1983. First, a court should "ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." McMillian v. Monroe County, Alabama, 520 U.S. 781, 785 (1997). Second, a court's "inquiry is dependent on an analysis of state law." Id. While the McMillian Court ultimately found an Alabama sheriff to be a state officer, it noted that its conclusion was based in Alabama law. Id. at 795. Thus, it would not be inconsistent for a sheriff or other official to be found a county officer in some states, but not others. Id. In coming to its conclusion, the McMillian Court investigated the applicable state

constitutional provisions, the Alabama Supreme Court's interpretation of those provisions, and the Alabama Code. Id. at 789. Therefore, this court will look to Tennessee law in its analysis.

At first glance, a general sessions court appears to be a state court. It was created by the Tennessee legislature under the authority of Article VI, § 1 of the Tennessee Constitution, which allows the legislature to create state inferior courts. Tenn. Code Ann. § 16-15-201 (2005). Sessions judges take the same oath as circuit court judges and chancellors. Id. at § 16-15-203. Judges are trained at seminars established by the administrative director of the courts for the State. Id. at § 16-15-211.

However, a closer inspection of the Tennessee Code and Constitution reveals that counties are responsible for general sessions courts. The statute creating sessions courts establishes that, in the event of a vacancy, a new sessions judge is appointed by the county legislative body, not the state legislature. Tenn. Code Ann. § 16-15-210 (2005). This requirement reflects the constitutional provision that vacancies in county offices be filled by the county legislative body. Tenn. Const. art. VII, 3 2. The code further requires that the county furnish general sessions judges with a courtroom and all necessary supplies or equipment. Id. at § 16-15-102. These expenses are taken from the county general fund, not state funds. Id. In addition, the county legislative body can designate up to three alternate venues besides the county seat where the general sessions court must meet. Id. at § 16-15-103. Most importantly, counties, not the State, pay the salary of general sessions judges. Id. at § 16-15-5006. In litigation arising from the performance of state

duties, the Code provides for representation of state employees but limits "state employees" to state officials whose compensation is paid by the State. Tenn. Code Ann. §§ 8-42-101(3)(A), 8-42-103 (2005). Since counties pay sessions judges, the State generally does not provide representation for sessions judges in litigation. See, e.g., Bryant v. Blanton, 463 F. Supp. 155 (W.D. Tenn. 1979); Graham v. Gen. Sessions Court, 157 S.W.3d 790 (Tenn. 2004); State ex rel. Winstead v. Moody, 596 S.W.2d 811 (Tenn. 1980).

Furthermore, Tennessee case law clearly places responsibility for general sessions courts on counties. In 1960, the Tennessee Supreme Court first addressed the issue of whether a sessions judge was a state or county office, finding the General Sessions Judge of Sumner County to be a county office. See Durham v. Dismukes, 333 S.W.2d 935, 938-39 (Tenn. 1960). In support of its conclusion, the Durham court noted that the county paid the judge's salary, the duties of the judge applied only to the people of that county, and the act creating the sessions court did not show any intent to expand the court's jurisdiction beyond county lines. See id. at 938. Regarding which entity paid the judge's salary, the court stated that "[t]he primary badge of a State officer is that the Legislature provide that the State pay the salary of the office." Id. The court felt that county judges and inferior courts were primarily local courts even if they had some jurisdiction over certain state matters, unless the legislature had determined to make them a state court. See id. at 939.

Plaintiffs contend that Durham is inapplicable because it concerned a general sessions court created by private act in 1949 and was only applicable to Sumner County, whereas the modern sessions courts,

including the Hardin County General Sessions Court, were created by general state statute in 1960. However, in cases well after 1960, the Tennessee Supreme Court reaffirmed the Durham conclusion that a general sessions judge was a county officer. See State v. Morrow, 75 S.W.3d 919, 922 (Tenn. 2002) ("A court of general sessions is a county court."); Moody, 596 S.W.2d at 813-14 (finding the office of a general sessions judge to be a county office). Moreover, on a question of law certified from the U.S. District Court for the Middle District of Tennessee, the Tennessee Supreme Court upheld Durham and applied the same analysis in determining that Tennessee sheriffs were county officers. See Spurlock v. Sumner County, 42 S.W.3d 75, 79 (Tenn. 2001).

For the foregoing reasons, this court finds that Hardin County, not the State of Tennessee, is responsible for the Hardin County General Sessions Court.

Regarding accountability for the appointment of a sign language interpreter, Tennessee law vests responsibility in the court, not the assistant district attorney, to appoint an interpreter for a deaf person who is a party to a court proceeding. Tenn. Code Ann. § 24-1-211(b)(1) (2005). Thus, the general sessions court alone is accountable for providing an interpreter. Since this court has found that the State of Tennessee is not liable for the Hardin County General Sessions Court, defendant's motion to dismiss is GRANTED.

IT IS SO ORDERED.

/s/
JAMES D. TODD

UNITED STATES DISTRICT JUDGE

1 August 2005
DATE

[notice of distribution omitted in printing]

APPENDIX H

U.S. Department of Justice
Civil Rights Division
Disability Rights Section
[Department of Justice Seal]

COMMONLY ASKED QUESTIONS ABOUT THE AMERICANS WITH DISABILITIES ACT AND LAW ENFORCEMENT

I. Introduction

Police officers, sheriff's deputies, and other law enforcement personnel have always interacted with persons with disabilities and, for many officers and deputies, the Americans with Disabilities Act (ADA) may mean few changes in the way they respond to the public. To respond to questions that may arise, this document offers common sense suggestions to assist law enforcement agencies in complying with the ADA. The examples presented are drawn from real-life situations as described by police officers or encountered by the Department of Justice in its enforcement of the ADA.

1. Q: What is the ADA?

A: The Americans with Disabilities Act (ADA) is a Federal civil rights law. It gives Federal civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It

guarantees equal opportunity for individuals with disabilities in State and local government services, public accommodations, employment, transportation, and telecommunications.

2. Q: How does the ADA affect my law enforcement duties?

A: Title II of the ADA prohibits discrimination against people with disabilities in State and local governments services, programs, and employment. Law enforcement agencies are covered because they are programs of State or local governments, regardless of whether they receive Federal grants or other Federal funds. The ADA affects virtually everything that officers and deputies do, for example:

- receiving citizen complaints;
- interrogating witnesses;
- arresting, booking, and holding suspects;
- operating telephone (911) emergency centers;
- providing emergency medical services;
- enforcing laws;
- and other duties.

3. Q: Who does the ADA protect?

A: The ADA covers a wide range of individuals with disabilities. An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. To be substantially limited means that such activities are restricted in the manner, condition, or duration in which they are performed in comparison with most people.

- The ADA also protects people who are discriminated against because of their association with a person with a disability.

Example: Police receive a call from a woman who complains that someone has broken into her residence. The police department keeps a list of dwellings where people with AIDS are known to reside. The woman's residence is on the list because her son has AIDS. Police fail to respond to her call, because they fear catching the HIV virus. The officers have discriminated against the woman on the basis of her association with an individual who has AIDS.

4. Q: What about someone who uses illegal drugs?

A: Nothing in the ADA prevents officers and deputies from enforcing criminal laws relating to an individuals current use or possession of illegal drugs.

II. Interacting with People with Disabilities

5. Q: What are some common problems that people with disabilities have with law enforcement?

A: Unexpected actions taken by some individuals with disabilities may be misconstrued by officers or deputies as suspicious or illegal activity or uncooperative behavior.

Example: An officer approaches a vehicle and asks the driver to step out of the car. The driver, who has a mobility disability, reaches behind the seat to retrieve her assistive device for walking. This appears suspicious to the officer.

- Individuals who are deaf or hard of hearing, or who have speech disabilities or mental retardation, or who are blind or visually impaired may not recognize or be able to respond to police directions. These individuals may erroneously be perceived as uncooperative.

Example: An officer yells "freeze" to an individual who is running from an area in which a crime has been reported. The individual, who is deaf, cannot hear the officer and continues to run. The officer mistakenly believes that the individual is fleeing from the scene. Similarly, ordering a suspect who is visually impaired to get over "there" is likely to lead to confusion and misunderstanding, because the suspect may have no idea where the officer is pointing.

Some people with disabilities may have a staggering gait or slurred speech related to their disabilities or the medications they take. These characteristics, which can be associated with neurological disabilities, mental/emotional disturbance, or hypoglycemia, may be misperceived as intoxication.

Example: An officer observes a vehicle with one working headlight and pulls the vehicle over. When the driver hands the registration to the officer, the officer notices that the driver's hand is trembling and her speech is slurred. The officer concludes that the individual is under the influence of alcohol, when in fact the symptoms are caused by a neurological disability.

Example: A call comes in from a local restaurant that a customer is causing a disturbance. When the responding officer arrives at the scene, she discovers a 25-year-old man swaying on his feet and grimacing. He has pulled the table cloth from the table. The officer believes that the man has had too much to drink and is behaving aggressively, when in fact he is having a seizure.

What can be done to avoid these situations?

Training, sensitivity, and awareness will help to ensure equitable treatment of individuals with disabilities as well as effective law enforcement. For example:

- When approaching a car with visible signs that a person with a disability may be driving (such as a designated license plate or a hand control), the police officer should be aware that the driver may reach for a mobility device.

- Using hand signals, or calling to people in a crowd to signal for a person to stop, may be effective ways for an officer to get the attention of a deaf individual.

- When speaking, enunciate clearly and slowly to ensure that the individual understands what is being said.

- Finally, typical tests for intoxication, such as walking a straight line, will be ineffective for individuals whose disabilities cause unsteady gait. Other tests, like breathalyzers, will provide more accurate results and reduce the possibility of false arrest.

6. Q: What if someone is demonstrating threatening behavior because of his or her disability?

A: Police officers may, of course, respond appropriately to real threats to health or safety, even if an individuals actions are a result of her or his disability. But it is important that police officers are trained to distinguish behaviors that pose a real risk from behaviors that do not, and to recognize when an individual, such as someone who is having a seizure or exhibiting signs of psychotic crisis, needs medical attention. It is also important that behaviors resulting from a disability not be criminalized where no crime has been committed. Avoid these scenarios:

- A store owner calls to report that an apparently homeless person has been in front of the store for an hour, and customers are complaining that he appears to be talking to himself. The individual, who has mental illness, is violating no loitering or panhandling laws. Officers arriving on the scene arrest him even though he is violating no laws.

- Police receive a call in the middle of the night about a teenager with mental illness who is beyond the control of her parents. All attempts to get services for the teenager at that hour fail, so the responding officer arrests her until he can get her into treatment. She ends up with a record, even though she committed no offense.

7. Q: What procedures should law enforcement officers follow to arrest and transport a person who uses a wheelchair?

A: Standard transport practices may be dangerous for many people with mobility disabilities. Officers should use caution not to harm an individual or damage his or her wheelchair. The best approach is to ask the person what type of transportation he or she can use, and how to lift or assist him or her in transferring into and out of the vehicle.

Example: An individual with a disability is removed from his wheelchair and placed on a bench in a paddy wagon. He is precariously strapped to the bench with his own belt. When the vehicle begins to move, he falls off of the bench and is thrown to the floor of the vehicle where he remains until arriving at the station.

- Some individuals who use assistive devices like crutches, braces, or even manual wheelchairs might be safely transported in patrol cars.

- Safe transport of other individuals who use manual or power wheelchairs might require

departments to make minor modifications to existing cars or vans, or to use lift-equipped vans or buses. Police departments may consider other community resources, e.g., accessible taxi services.

8. Q: What steps should officers follow to communicate effectively with an individual who is blind or visually impaired?

A: It is important for officers to identify themselves and to state clearly and completely any directions or instructions -- including any information that is posted visually. Officers must read out loud in full any documents that a person who is blind or visually impaired needs to sign. Before taking photos or fingerprints, it is a good idea to describe the procedures in advance so that the individual will know what to expect.

9. Q: Do police personnel need to take special precautions when providing emergency medical services to someone who has HIV or AIDS?

A: Persons with HIV or AIDS should be treated just like any other person requiring medical attention. In fact, emergency medical service providers are required routinely to treat all persons as if they are infectious for HIV, Hepatitis B, or other blood borne pathogens, by practicing universal precautions. Many people do not know that they are infected with a blood borne pathogen, and there are special privacy considerations that may cause those who know they are infected not to disclose their infectious status.

- Universal precautions for emergency service providers include the wearing of gloves, a mask, and protective eyewear, and, where appropriate, the proper disinfection or disposal of contaminated medical equipment. Protective barriers like gloves should be used whenever service providers are exposed to blood.

Example: Police are called to a shopping mall to assist a teenager who has cut his hand and is bleeding profusely. As long as the attending officers wear protective gloves, they will not be at risk of acquiring HIV, Hepatitis B, or any other blood borne pathogen, while treating the teenager.

- Refusing to provide medical assistance to a person because he or she has, or is suspected of having, HIV or AIDS is discrimination.

Example: Police are called to a shopping mall, where an individual is lying on the ground with chest pains. The responding officer asks the individual whether she is currently taking any medications. She responds that she is taking AZT, a medication commonly prescribed for individuals who are HIV-positive or have AIDS. The officer announces to his colleagues that the individual has AIDS and refuses to provide care. This refusal violates the ADA.

III. Effective Communication

10. Q: Do police departments have to arrange for a sign language interpreter every time an officer interacts with a person who is deaf?

A: No. Police officers are required by the ADA to ensure effective communication with individuals who are deaf or hard of hearing. Whether a qualified sign language interpreter or other communication aid is required will depend on the nature of the communication and the needs of the requesting individual. For example, some people who are deaf do not use sign language for communication and may need to use a different communication aid or rely on lipreading. In one-on-one communication with an individual who lipreads, an officer should face the individual directly, and should ensure that the communication takes place in a well-lighted area.

- Examples of other communication aids, called "auxiliary aids and services" in the ADA, that assist people who are deaf or hard of hearing include the exchange of written notes, telecommunications devices for the deaf (TDD's) (also called text telephones (TT's) or teletypewriters (TTY's)), telephone handset amplifiers, assistive listening systems, and videotext displays.

- The ADA requires that the expressed choice of the individual with the disability, who is in the best position to know her or his needs, should be given primary consideration in determining which communication aid to provide. The ultimate decision is made by the police department. The department should honor the individuals choice unless it can demonstrate that another effective method of communication exists.

- Police officers should generally not rely on family members, who are frequently emotionally involved, to provide sign language interpreting.

Example: A deaf mother calls police to report a crime in which her hearing child was abused by the child's father. Because it is not in the best interests of the mother or the child for the child to hear all of the details of a very sensitive, emotional situation, the mother specifically requests that the police officers procure a qualified sign language interpreter to facilitate taking the report. Officers ignore her request and do not secure the services of an interpreter. They instead communicate with the hearing child, who then signs to the mother. The police department in this example has violated the ADA because it ignored the mothers request an inappropriately relied on a family member to interpret.

- In some limited circumstances a family member may be relied upon to interpret.

Example: A family member may interpret in an emergency, when the safety or welfare of the public or the person with the disability is of paramount importance. For example, emergency personnel responding to a car accident may need to rely on a family member to interpret in order to evaluate the physical condition of an individual who is deaf. Likewise, it may be appropriate to rely on a family member to interpret when a deaf individual has

been robbed and an officer in hot pursuit needs information about the suspect.

Example: A family member may interpret for the sake of convenience in circumstances where an interpreter is not required by the ADA, such as in situations where exchanging written notes would be effective. For example, it would be appropriate to rely on a passenger who is a family member to interpret when an individual who is deaf is asking an officer for traffic directions, or is stopped for a traffic violation.

11. Q: If the person uses sign language, what kinds of communication will require an interpreter?

A: The length, importance, or complexity of the communication will help determine whether an interpreter is necessary for effective communication.

- In a simple encounter, such as checking a driver's license or giving street directions, a notepad and pencil normally will be sufficient.

- During interrogations and arrests, a sign language interpreter will often be necessary to effectively communicate with an individual who uses sign language.

- If the legality of a conversation will be questioned in court, such as where Miranda warnings are issued, a sign language interpreter may be necessary. Police officers should be careful about miscommunication in

the absence of a qualified interpreter -- a nod of the head may be an attempt to appear cooperative in the midst of misunderstanding, rather than consentor a confession of wrongdoing.

- In general, if an individual who does not have a hearing disability would be subject to police action without interrogation, then an interpreter will not be required, unless one is necessary to explain the action being taken.

Example: An officer clocks a car on the highway driving 15 miles above the speed limit. The driver, who is deaf, is pulled over and issued a noncriminal citation. The individual is able to understand the reasons for the citation, because the officer exchanges written notes with the individual and points to information on the citation. In this case, a sign language interpreter is not needed.

Example: An officer responds to an aggravated battery call and upon arriving at the scene observes a bleeding victim and an individual holding a weapon. Eyewitnesses observed the individual strike the victim. The individual with the weapon is deaf, but the officer has probable cause to make a felony arrest without an interrogation. In this case, an interpreter is not necessary to carry out the arrest.

12. Q: Do I have to take a sign language interpreter to a call about a violent crime in progress or a similar urgent situation involving a person who is deaf?

A: No. An officer's immediate priority is to stabilize the situation. If the person being arrested is deaf, the officer can make an arrest and call for an interpreter to be available later at the booking station.

13. Q: When a sign language interpreter is needed, where do I find one?

A: Your department should have one or more interpreters available on call. This is generally accomplished through a contract with a sign language interpreter service. Communicating through sign language will not be effective unless the interpreter is familiar with the vocabulary and terminology of law enforcement, so your department should ensure that the interpreters it uses are familiar with law enforcement terms.

14. Q: Is there any legal limit to how much my department must spend on communication aids like interpreters?

A: Yes. Your department is not required to take any step that would impose undue financial and administrative burdens. The "undue burden" standard is a high one. For example, whether an action would be an undue financial burden is determined by considering all of the resources available to the department. If providing a particular auxiliary aid or service would impose an undue burden, the department must seek alternatives that ensure effective communication to the maximum extent feasible.

15. Q: When would an officer use an assistive listening device as a communication aid?

A: Assistive listening systems and devices receive and amplify sound and are used for communicating in a group setting with individuals who are hard of hearing.

- At headquarters or a precinct building, if two or more officers are interrogating a witness who is hard of hearing, or in meetings that include an individual who is hard of hearing, an assistive listening device may be needed.

16. Q: What is a TDD and does every police station have to have one?

A: A telecommunications device for the deaf (TDD) is a device used by individuals with hearing or speech disabilities to communicate on the telephone. A TDD is a keyboard with a display for receiving typed text that can be attached to a telephone. The TDD user types a message that is received by another TDD at the other end of the line.

- Arrestees who are deaf or hard of hearing, or who have speech disabilities, may require a TDD for making outgoing calls. TDD's must be available to inmates with disabilities under the same terms and conditions as telephone privileges are offered to all inmates, and information indicating the availability of the TDD should be provided.

- TDDs typically cost $200-300 each and can be used with a standard telephone. It is unlikely that the cost of purchasing a TDD will be prohibitive. Still, a small department with limited resources could arrange to share a TDD with a local courthouse or other entity, so long as the TDD is immediately available as needed.

17. Q. What about "911" calls? How are those made accessible to people with speech or hearing disabilities?

A: Individuals with hearing and speech disabilities must have direct access to "911" or similar emergency telephone services, meaning that emergency response centers must be equipped to receive calls from TDD and computer modem users without relying on third parties or state relay services. It is important that operators are trained to use the TDD when the caller is silent, and not only when the operator recognizes the tones of a TDD at the other end of the line. For additional information, please refer to the Department of Justices publication, Commonly Asked Questions Regarding Telephone Emergency Services. For information about how to obtain this and other publications, see the resources section at the end of this document.

18. Q: Procedures at my office require citizens to fill out forms when reporting crimes. What if the person has a vision disability, a learning disability, mental retardation or some other disability that may prevent the person from filling out a form?

A: The simplest solution is to have an officer or clerk assist the person in reading and filling out the form. Police officers have probably been doing this for years. The form itself could also be provided in an alternative format. Providing a copy of the form in large print (which is usually as simple as using a copy machine or computer to increase type size) will make the form accessible to many individuals with moderate vision disabilities.

IV. Architectural Access

19. Q: Does the ADA require all police stations to be accessible to people with disabilities?

A: No. Individuals with disabilities must have equal access to law enforcement services, but the ADA is flexible in how to achieve that goal. The ADA requires programs to be accessible to individuals with disabilities, not necessarily each and every facility. Often, structural alterations to an existing police station or sheriffs office will be necessary to create effective access. In some situations, however, it may be as effective to use alternative methods, such as relocating a service to an accessible building, or providing an officer who goes directly to the individual with the disability. Whatever approach to achieving "program access" is taken, training of officers and deputies, well-developed policies, and clear public notice of the approach will be critical to ensuring successful ADA compliance.

Example: A police station in a small town is inaccessible to individuals with mobility disabilities. The department decides that it

cannot alter all areas of the station because of insufficient funds. It decides to alter the lobby and restrooms so that the areas the public uses -- for filling out crime reports, obtaining copies of investigative reports for insurance purposes, or seeking referrals to shelter care -- are accessible. Arrangements are made to conduct victim and witness interviews with individuals with disabilities in a private conference room in the local library or other government building, and to use a neighboring department's accessible lock-up for detaining suspects with disabilities. These measures are consistent with the ADA's program accessibility requirements.

Example: An individual who uses a wheelchair calls to report a crime, and is told that the police station is inaccessible, but that the police department has a policy whereby a police officer will meet individuals with disabilities in the parking lot. The individual arrives at the parking lot, waits there for three hours, becomes frustrated, and leaves. By neglecting to adequately train officers about its policy, the police department has failed in its obligation to provide equal access to police services, and has lost valuable information necessary for effective law enforcement.

20. Q: What about holding cells and jails that are not accessible?

A: An arrestee with a mobility disability must have access to the toilet facilities and other amenities provided at the lock-up or jail. A law enforcement

agency must make structural changes, if necessary, or arrange to use a nearby accessible facility.

- Structural changes can be undertaken in a manner that ensures officer safety and general security. For example, grab bars in accessible restrooms can be secured so that they are not removable.

- If meeting and/or interrogation rooms are provided, those areas should also be accessible for use by arrestees, family members, or legal counsel who have mobility disabilities.

21. Q: Is there a limit to the amount of money my agency must spend to alter an existing police facility?

A: Yes. It is the same legal standard of "undue burden" discussed earlier with regard to the provision of communication aids. Your agency is not required to undertake alterations that would impose undue financial and administrative burdens. If an alteration would impose an "undue burden", the agency must chose an alternative that ensures access to its programs and services.

22. Q. We are building a new prison. Do we need to make it accessible?

A: Yes. All new buildings must be made fully accessible to, and usable by, individuals with disabilities. The ADA provides architectural standards that specify what must be done to create access.

- Either the Uniform Federal Accessibility Standards (UFAS) or the ADA Standards for Accessible Design (without the elevator exemption) (ADA Standards) may be used. UFAS has specific scoping requirements for prisons that require, among other things, that 5% of all cells be made accessible to individuals with mobility disabilities.

- Unlike modifications of existing facilities, there is no undue burden limitation for new construction.

- In addition, if an agency alters an existing facility for any reason -- including reasons unrelated to accessibility -- the altered areas must be made accessible to individuals with disabilities.

V. Modifications of Policies, Practices, and Procedures

23. Q: What types of modifications in law enforcement policies, practices, and procedures does the ADA require?

A: The ADA requires law enforcement agencies to make reasonable modifications in their policies, practices, and procedures that are necessary to ensure accessibility for individuals with disabilities, unless making such modifications would fundamentally alter the program or service involved. There are many ways in which a police or sheriffs department might need to modify its normal practices to accommodate a person with a disability.

Example: A department modifies a rule that prisoners or detainees are not permitted to have food in their cells excet at scheduled intervals, in order to accommodate an individual with diabetes who uses medication and needs access to carbohydrates or sugar to keep blood sugar at an appropriate level.

Example: A department modifies its enforcement of a law requiring a license to use motorized vehicles on the streets, in order to accommodate individuals who use scooters or motorized wheelchairs. Such individuals are pedestrians, but may need to use streets where curb cuts are unavailable.

Example: A department modifies its regular practice of handcuffing arrestees behind their backs, and instead handcuffs deaf individuals in front in order for the person to sign or write notes.

Example: A department modifies its practice of confiscating medications for the period of confinement, in order to permit inmates who have disabilities that require self-medication, such as cardiac conditions or epilepsy, to self-administer medications that do not have abuse potential.

Example: A department modifies the procedures for giving Miranda warnings when arresting an individual who has mental retardation. Law enforcement personnel use simple words and ask the individual to repeat each phrase of the warnings in her or his own

words. The personnel also check for understanding, by asking the individual such questions as what a lawyer is and how a lawyer might help the individual, or asking the individual for an example of what a right is. Using simple language or pictures and symbols, speaking slowly and clearly, and asking concrete questions, are all ways to communicate with individuals who have mental retardation.

- Informal practices may also need to be modified. Sometimes, because of the demand for police services, third party calls are treated less seriously. Police officers should keep in mind that calling through a third party may be the only option for individuals with certain types of disabilities.

VI. Resources

24. Q: It sounds like awareness and training are critical for effective interaction with individuals with disabilities. How can I find out more about the needs of my local disability community?

A: State and local government entities were required, by January 26, 1993, to conduct a "self-evaluation" reviewing their current services, policies, and practices for compliance with the ADA. Entities employing 50 or more persons were also to develop a "transition plan" identifying structural changes that needed to be made. As part of that process, the ADA encouraged entities to involve individuals with disabilities from their local communities. Continuing this process will promote access solutions that are reasonable and effective.

Even though the deadlines for the self-evaluation, transition plan, and completion of structural changes have passed, compliance with the ADA is an ongoing obligation.

25. Q: Where can I turn for answers to other questions about the ADA?

A: The Department of Justice's toll-free ADA Information Line answers questions and offers free publications about the ADA. The telephone numbers are: 800-514-0301 (voice) or 800-514-0383 (TTY). Publications are also available from the ADA Website www.ada.gov.

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APPENDIX I

U.S. Department of Justice
Civil Rights Division
Disability Rights Section
[Department of Justice Seal]

Communicating with People Who Are Deaf or Hard of Hearing

ADA Guide for Law Enforcement Officers

As a law enforcement officer, you can expect to come into contact with people who are deaf or hard of hearing. It is estimated that up to nine percent of the population has some degree of hearing loss, and this percentage will increase as the population ages.

A driver who is deaf writes on a pad of paper to communicate with an officer.

Under the Americans with Disabilities Act (ADA), people who are deaf or hard of hearing are entitled to the same services law enforcement provides to anyone else. They may not be excluded or segregated from

services, be denied services, or otherwise be treated differently than other people. Law enforcement agencies must make efforts to ensure that their personnel communicate effectively with people whose disability affects hearing. This applies to both sworn and civilian personnel.

Your agency has adopted a specific policy regarding communicating with people who are deaf or hard of hearing. It is important to become familiar with this policy.

Requirements for Effective Communication

The ADA requires that . . .

- Law enforcement agencies must provide the communication aids and services needed to communicate effectively with people who are deaf or hard of hearing, except when a particular aid or service would result in an undue burden or a fundamental change in the nature of the law enforcement services being provided.

- Agencies must give primary consideration to providing the aid or service requested by the person with the hearing disability.

- Agencies cannot charge the person for the communication aids or services provided.

- Agencies do *not* have to provide personally prescribed devices such as hearing aids.

- When interpreters are needed, agencies must provide interpreters who can interpret effectively, accurately, and impartially.

- Only the head of the agency or his or her designee can make the determination that a particular aid or service would cause an undue burden or a fundamental change in the nature of the law enforcement services being provided.

Your agency's policy explains how to obtain interpreters or other communication aids and services when needed.

Communicating with People Who are Deaf or Hard of Hearing

Officers may find a variety of communication aids and services useful in different situations.

- Speech supplemented by gestures and visual aids can be used in some cases.

- A pad and pencil, a word processor, or a typewriter can be used to exchange written notes.

- A teletypewriter (TTY, also known as a TDD) can be used to exchange written messages over the telephone.

- An assistive listening system or device to amplify sound can be used when speaking with a person who is hard of hearing.

- A sign language interpreter can be used when speaking with a person who knows sign language.

- An oral interpreter can be used when speaking with a person who has been trained to speech read (read lips). **Note:** Do *not* assume that speech reading will be effective in most situations. On average, only about one third of spoken words can be understood by speech reading.

The type of situation, as well as the individual's abilities, will determine which aid or service is needed to communicate effectively.

Practical Suggestions for Communicating Effectively

- Before speaking, get the person's attention with a wave of the hand or a gentle tap on the shoulder.

- Face the person and do not turn away while speaking.

- Try to converse in a well-lit area.

- Do not cover your mouth or chew gum.

- If a person is wearing a hearing aid, do not assume the individual can hear you.

- Minimize background noise and other distractions whenever possible.

- When you are communicating orally, speak slowly and distinctly. Use gestures and facial expressions to reinforce what you are saying.

- Use visual aids when possible, such as pointing to printed information on a citation or other document.

- Remember that only about one third of spoken words can be understood by speech reading.

- When communicating by writing notes, keep in mind that some individuals who use sign language may lack good English reading and writing skills.

- If someone with a hearing disability cannot understand you, write a note to ask him or her what communication aid or service is needed.

- If a sign language interpreter is requested, be sure to ask *which* language the person uses. American Sign Language (ASL) and Signed English are the most common.

- When you are interviewing a witness or a suspect or engaging in any complex conversation with a person whose primary language is sign language, a qualified interpreter is usually needed to ensure effective communication.

- When using an interpreter, look at and speak directly to the deaf person, not to the interpreter.

- Talk at your normal rate, or slightly slower if you normally speak very fast.

- Only one person should speak at a time.

- Use short sentences and simple words.

- Do not use family members or children as interpreters. They may lack the vocabulary or the impartiality needed to interpret effectively.

What Situations *Require* an Interpreter?

Generally, interpreter services are not required for simple transactions – such as checking a license or giving directions to a location – or for urgent situations – such as responding to a violent crime in progress.

Example: An officer clocks a car on the highway going 15 miles per hour above the speed limit. The driver, who is deaf, is pulled over and is issued a noncriminal citation. The individual is able to understand the reason for the citation because the officer points out relevant information printed on the citation or written by the officer.

Example: An officer responds to an aggravated battery call and upon arriving at the scene observes a bleeding victim and an individual holding a weapon. Eyewitnesses observed the individual strike the victim. The individual with the weapon is deaf. Because the officer has probable cause to make a felony arrest without an interrogation, an interpreter is not necessary to carry out the arrest.

However, an interpreter may be needed in lengthy or complex transactions – such as interviewing a victim, witness, suspect, or arrestee – if the person being interviewed normally relies on sign language or speech reading to understand what others are saying.

Example: An officer responds to the scene of a domestic disturbance. The husband says the wife

has been beating their children and he has been trying to restrain her. The wife is deaf. The officer begins questioning her by writing notes, but her response indicates a lack of comprehension. She requests a sign language interpreter. In this situation an interpreter should be called. If the woman's behavior is threatening, the officer can make an arrest and call for an interpreter to be available later at the booking station.

It is inappropriate to ask a family member or companion to interpret in a situation like this because emotional ties may interfere with the ability to interpret impartially.

Example: An officer responds to the scene of a car accident where a man has been seriously injured. The man is conscious, but is unable to comprehend the officer's questions because he is deaf. A family member who is present begins interpreting what the officer is saying.

A family member or companion *may* be used to interpret in a case like this, where the parties are willing, the need for information is urgent, and the questions are basic and uncomplicated. However, in general, do not expect or demand that a deaf person provide his or her own interpreter. As a rule, when interpreter service is needed, it must be provided by the agency.

List your agency's contact information for obtaining an interpreter, an assistive listening device, or other communication aid or service here.

For further information on the Americans with Disabilities Act contact:

ADA Website
www.ada.gov

ADA Information Line
800-514-0301 (voice)
800-514-0383 (TTY)

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January 2006

Supreme Court, U.S.
FILED
MAY 18 2009
OFFICE OF THE CLERK

No. 08-1291

In The Supreme Court of the United States

ODIS TUCKER; VONNIE TUCKER; and BLAKE TUCKER,

Petitioners,

v.

HARDIN COUNTY, political subdivision of the State of Tennessee; SAVANNAH POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF SAVANNAH POLICE DEPARTMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Issues not raised, or developed in the argument in the court of appeals are waived and will not be considered by the Supreme Court. The Tuckers did not develop in their brief in the court below the issue of the standard of proof required for the recovery of compensatory damages under the Americans with Disabilities Act. Because the issue was not raised below, should the Petition for Writ of Certiorari be denied on this issue?

2. The Americans with Disabilities Act does not apply in the context of an in-the-field arrest before the scene is secure. Blake Tucker was arrested because he assaulted a police officer and a citizen, and committed disorderly conduct; his step-father, Odis Tucker, was arrested for attempting to interfere with the arrest. Under these circumstances were the officers required to accommodate the Tuckers' disabilities before securing the scene?

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The opinion of the court of appeals is published at 539 F.3d 526 (6th Cir. 2008). The opinion of the district court granting the Savannah Police Department's motion for summary judgment is published at 443 F.Supp.2d 971 (W.D.Tenn. 2006).

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals was entered on August 29, 2008. The Petition for Rehearing En Banc was denied on January 16, 2009, and the Certiorari Petition was filed on April 16, 2009. Odis, Vonnie, and Blake Tucker invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOKED

The Tuckers have cited the applicable statutory and regulatory provisions involved in this case.

STATEMENT OF THE CASE

I. Introduction.

Blake and Odis Tucker[1] claim that their arrests by police officers of the City of Savannah, Tennessee, violated the Americans with Disabilities Act. 6th Cir. Joint Apx. pg. 14. Because the Tuckers are deaf and mute they are qualified individuals with a disability as defined by 42 U.S.C. §12131(2). They claim they were "in need of the services, programs and activities of law enforcement . . . of . . . the City of Savannah" and the City discriminated against them by failing to provide an effective means of communication. 6th Cir. Joint Apx. pgs. 14 and 17.

II. The police officers communicated effectively enough for the Tuckers to accomplish the purpose of the trip, i.e., to pick up Blake's wife and child.

Blake and Odis Tucker came to Savannah to pick up Lauren Tucker and Kayla Tucker, the minor child of Blake and Lauren. 6th Cir. Joint Apx. pg. 16. Lauren and Kayla had been visiting Lauren's mother, Donna Spears, in Savannah, Tennessee. *Tucker v. Hardin County,* 443 F.Supp.2d 971, 973 (W.D.Tenn. 2006). Sometime after Blake and Odis Tucker arrived

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[1] Vonnie Tucker had no involvement with the City's officers and her lawsuit is only against Hardin County, Tennessee. *Tucker v. Hardin County,* 443 F.Supp.2d 971, 972 n. 3 (W.D.Tenn. 2006).

at Ms. Spears's home, one of the neighbors called the Savannah Police Department and Officers Mike Pope, John Sylvester, and T.J. Barker responded to the call. *Tucker v. Hardin County,* 443 F.Supp.2d at 973; 6th Cir. Joint Apx. pgs. 16; 43; 112-13; 145; and 150.

When Officer Pope arrived, he saw Blake and Odis using sign language. 6th Cir. Joint Apx. pgs. 113-14. Officer Pope then began using his pad and pen to communicate with Blake and Odis. Petition at pgs. 7-8. He asked if they had called the police and Blake responded that he did not know who called the police. 6th Cir. Joint Apx. pg. 114. Officer Pope then told Blake and Odis to wait while he tried to find out what was going on. Petition for Writ of Certiorari at pg. 8.

Donna Spears told Officer Pope that the Tuckers had come to pick up Lauren and the baby, but that Lauren did not want to go with them. 6th Cir. Joint Apx. pg. 114. Officer Pope separated Donna Spears from Blake and Odis by telling her to go in her house. 6th Cir. Joint Apx. pg. 114. This is standard procedure in a domestic case. 6th Cir. Joint Apx. pg. 146.

By communicating in writing Officer Pope learned that the Tuckers had come to Savannah to pick up Lauren and her baby, but Donna Spears would not let them leave. 6th Cir. Joint Apx. pgs. 114-15. Officer Pope then told the Tuckers to wait outside while he went in to talk with Donna Spears. 6th Cir. Joint Apx. pg. 115.

Officer Pope went inside with Donna Spears and her daughter, Lauren Tucker, to find out what was going on. 6th Cir. Joint Apx. pg. 115. Donna Spears repeated that Lauren did not want to leave with the Tuckers. 6th Cir. Joint Apx. pg. 116. At first, Lauren refused to communicate with Officer Pope. *Id.* Officer Pope continued trying to communicate with Lauren by writing. *Id.* He explained he could not help her if she would not communicate with him. *Id.* Lauren finally agreed to communicate with Officer Pope if her mother left the room. *Id.* at pgs. 116-17. Officer Pope then asked Mrs. Spears to leave and, after she left, Lauren began communicating with him. *Id.* at pg. 117. Lauren Tucker told Officer Pope that she wanted to leave with Blake and Odis. *Id.*; Petition at pg. 8. Officer Pope then told Ms. Spears that if her daughter wanted to leave, he could not stop her. 6th Cir. Joint Apx. at pg. 117.

Officer Pope, again using written communication, told the Tuckers that Lauren would be leaving with them. *Id.* at pgs. 118-19. The Tuckers understood that the purpose of the trip had been met. Petition at pgs. 8-9. The police officers walked with Lauren Tucker to the van. Donna Spears and her friend Judy Crotts also walked to the van. *Id.* Ms. Spears wanted to hold her granddaughter one final time before Kayla and Lauren left. After Ms. Spears held her granddaughter, Lauren began putting Kayla in her car-seat and at about the same time Blake attacked Judy Crotts.

III. Blake Tucker was arrested for assault, resisting arrest, and disorderly conduct; and Odis Tucker was arrested for interfering with police officers.

As Lauren was putting Kayla in the van, Officer Pope saw Blake Tucker swing his fist and hit Judy Crotts. 6th Cir. Joint Apx. pgs. 119-20 and 129-30. Officer Pope then pulled Donna Spears behind him and held up his hands indicating for Blake Tucker to stop. *Id.* at pg. 120. Blake then hit Officer Pope in the chest. *Id.* After struggling with the officers, Blake Tucker was taken to the ground, but he continued to resist by trying to prevent the officers from handcuffing him. *Id.* at pgs. 120-21. Officer Pope then struck Blake Tucker twice on the right shoulder to get control of his right hand. *Id.* at pgs. 120-21 and 151. During the time the officers were on the ground struggling with Blake, Odis Tucker approached the officers as if he might be about to interfere with the arrest. *Id.* at pgs. 121-23 and 127.

Blake was arrested and charged with assaulting Judy Crotts and Officer Pope, disorderly conduct, and resisting arrest. *Id.* at pgs. 138 and 154-61. He pleaded guilty to both assault charges and to disorderly conduct. *Id.* at pgs. 176-77. Odis Tucker was arrested and charged with interference with an officer, resisting arrest, and disorderly conduct. *Id.* at pgs. 138 and 162-67. The charges against Odis were dismissed by the state as part of the plea agreement with Blake Tucker.

REASONS FOR DENYING THE PETITION

I. The Tuckers waived the issue regarding the standard of proof for compensatory damages.

The district court noted that the Tuckers would have to prove intentional discrimination to recover compensatory damages. *Tucker v. Hardin County,* 443 F.Supp.2d at 973 (W.D.Tenn. 2006). The Tuckers take issue with intentional discrimination as the standard for recovery of compensatory damages under the Act. Petition at pg. 15.

The Tuckers knew the district court had concluded that proof of intentional discrimination was necessary to recover compensatory damages, but they did not raise this issue in the court of appeals. The closest they came to raising the issue was in their brief where they stated the following issue:

> As to the Plaintiffs' claims against the City of Savannah Police Department, what is the standard for evaluating an ADA claim of discrimination as to hearing and speech disabled persons and their rights to 'auxiliary aids' in the context of a police confrontation with them and other non-disabled member (sic) of the public

Brief of Appellants Odis Tucker, Vonnie Tucker and Blake Tucker, at pgs. 1-2.

To the extent this raised the issue, it did so only in a perfunctory way. Beyond this one-time mention of the standard, the Tuckers made no effort to develop

this argument. *Id.* The Tuckers' failure to develop this issue in their argument (*Id.* at pgs. 24-30 and 32-43) results in the issue being waived. *See Vallejo Piedrahita v. Mukasey,* 524 F.3d 142, 144-45 (1st Cir. 2008). Issues not raised in the court of appeals will not be addressed by the Supreme Court of the United States. *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Because the Tuckers did not raise or develop this issue in the court of appeals, their petition should be denied as to the correct standard for recovering compensatory damages.

II. The arrests were because of the commission of crimes and not "because of" or "solely because of" the Tuckers' disabilities.

The opinions below recognize that police officers are expected to react to the individuals and the changing circumstances they encounter. *Tucker v. Hardin County, et al.*, 539 F.3d 526, 536 (6th Cir. 2008); *Tucker v. Hardin County, et al.*, 443 F.Supp.2d 971, 975-76 (W.D.Tenn. 2006). The courts should not add to the often dangerous nature of police work by requiring that they measure their actions when making in-the-field arrests by the requirements of the Act before the scene is secure. The Act may apply in the context of some arrests, but not in the context of the arrests in this case in which the officers had not yet gained control of the situation. The Tuckers' conduct forced the officers to act to protect themselves and others.

A. Arrests made because an officer misperceives the effects of a disability may violate the Act.

Arrests made because an officer misperceives the effects of a disability such as a stroke, may violate the Act. *See, e.g., Lewis v. Truitt*, 960 F.Supp. 175, 178 (S.D.Ind. 1997). A determination as to whether the Act creates a cause of action under these circumstances is a fact specific determination.

B. If the injury results from the failure to accommodate a disability following an arrest unrelated to the disability, the Act may provide a cause of action.

What about the situation in which the officer makes an arrest not related to the disability and then the failure to accommodate the disability subsequent to the arrest causes an injury? Under these circumstances the injured person may have a cause of action under the Act. For example, transporting a wheelchair-bound arrestee in a van that lacks wheelchair restraints may establish a cause of action for injuries received. *See, e.g., Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998). But these circumstances are different from the circumstances confronting the City's officers in this case. *See, Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007).

Also, the facts of this case distinguish it from the factual scenario discussed by the Tuckers at pg. 19 of their Petition. That factual scenario is more like

Center v. City of West Carrollton, 227 F.Supp.2d 863 (S.D.Ohio 2002). In *Center* the police did not call an interpreter to assist in interviewing a victim; and, despite the victim's lack of proficiency in English, the officer persisted in using written communications.

C. An officer's in-the-field arrest is not governed by the Act prior to the officer securing the scene.

But the facts of this case remove it from the scenarios discussed above. This case falls into a separate category, i.e., the arrest is not based on the disability, but rather on the Tuckers' independent criminal acts. In this case, the arrest was not based on the misperceived effects of the Tuckers' disabilities and the Tuckers were not injured because the officers failed to accommodate their disabilities after securing the scene. Furthermore, the communications preceding Blake's assault of Ms. Crotts were effective.

1. The police officers communicated effectively enough for Blake and Odis to receive the very thing they came for, i.e., Lauren and the baby.

This case consists of two parts: (1) before Blake Tucker assaulted Judy Crotts; and (2) after he assaulted Judy Crotts. If Blake Tucker had not assaulted Judy Crotts, the Tuckers would have been on their way to Alabama and no one would have claimed a failure to accommodate. Why? Because the

communications were effective. It was Blake Tucker's criminal conduct, not a lack of communication, that gave rise to this case.

Before the assault, the officers arrived on the scene and communicated with Blake, Odis, and Lauren in writing. 6th Cir. Joint Apx. at pgs. 114-17; Petition at pg. 8. The communications were effective enough that Lauren and the baby were preparing to leave with Blake and Odis. 6th Cir. Joint Apx. at pgs. 118-19. The Tuckers understood that Lauren and her daughter would be leaving with them. Petition at pgs. 8-9. After Ms. Spears held her granddaughter one last time, Blake Tucker assaulted Ms. Crotts and part 2 began.

2. Blake Tucker was arrested because he assaulted Judy Crotts and Officer Pope, he resisted arrest, and committed disorderly conduct.

Blake Tucker was arrested for assaulting a police officer and a citizen. He was also charged with disorderly conduct and resisting arrest. These charges did not result from the failure of the officers to call for an interpreter, but rather because Blake Tucker committed the crimes. The officers treated him like any non-disabled person who assaulted a citizen and a police officer.

a. The Tuckers misstate the facts in their petition regarding the assault.

In their Petition, Blake claims he did not assault Judy Crotts but merely "put his arm out to keep her from interfering and she fell back to the ground." Petition at pg. 9. He also claims the officers "hit him in the mouth with a gun chipping his tooth, and he was punched in the face three or four times." *Id.*

There is one problem with the Tuckers' recitation of the facts: It is wrong. Blake Tucker admitted he assaulted Ms. Crotts and Officer Pope, and that he committed disorderly conduct. 6th Cir. Joint Apx. pgs. 176-77. He cannot now approach this case as if he had not committed these crimes. The Tuckers also contradict themselves regarding the communications between Blake and the police. The Tuckers claim that after Blake's initial encounter with Officer Pope, there were no further written communications between Blake and the police. Petition at pg. 9. But on the next page the Tuckers say that Officer Pope communicated in writing with Blake after Lauren decided to leave with Blake. *Id.* at pg. 9.

b. Blake Tucker cannot deny he committed the crimes.

Not only is he prevented from denying he committed the crimes, but he is also prevented from relitigating these matters by claiming the officers used excessive force. Excessive force is an affirmative

defense to the charges of assault. Tenn. Code Ann. §39-11-611(e)(1)-(2). The conviction means that Blake Tucker did not have a self-defense justification. *See, Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999). It is too late for him to assume the role of victim.

Blake Tucker was arrested because he assaulted two persons and committed disorderly conduct. He was not arrested because of his disability. On the contrary, just before his criminal outburst the Tuckers were preparing to leave Tennessee and return to their home in Eastaboga, Alabama, with Lauren and the baby.

3. Odis Tucker was arrested because the officers reasonably believed he was about to interfere with the arrest of Blake.

Odis Tucker was not arrested because of his disability. He was arrested because he attempted to interfere with the officers as they struggled on the ground with Blake. 6th Cir. Joint Apx. pgs. 121; 123-27; 147; and 151-52. Officer Pope, who had already been assaulted by Blake, believed Odis Tucker was a threat to the officers when he approached them from behind. 6th Cir. Joint Apx. pgs. 123; 125; and 127. The officers had never dealt with Blake or Odis and were forced to make their decisions based on events occurring at the scene. 6th Cir. Joint Apx. pgs. 148; and 152.

4. Under these circumstances the officers had no duty to stop during the arrest and concern themselves with calling an interpreter.

It was based on these events that the officers arrested Blake and Odis. The officers were not under a duty to stop and determine whether they were complying with the Act before the scene was secure. "To require the officers to factor in whether their actions are going to comply with the [Act], in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and nearby civilians, would pose an unnecessary risk to innocents." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000). To do so would require "fulfillment of [the Act's] objective . . . at the expense of the safety of the general public." *Id.*

This is particularly true in this case. Blake Tucker had assaulted a bystander and a police officer, and he committed disorderly conduct which necessarily involves fighting or violent behavior. Tenn. Code Ann. §39-17-305(a)(1). His violent behavior made it necessary for the officers to gain control of the situation; the arrests were not because of the Tuckers' disabilities.

5. There is no conflict among the courts as to whether the Act applies in the context of an in-the-field arrest before the officers have secured the scene.

The Tuckers do not address the issue of whether the Act applies to arrests made under the circumstances of this case. Petition at pgs. 14-26. The Sixth Circuit's opinion in this case is in agreement with other courts that have decided this issue. *See, Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007); *Thompson v. Williamson County,* 219 F.3d 555 (6th Cir. 2000); *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1996); *Patrice v. Murphy*, 43 F.Supp.2d 1156 (W.D.Wash. 1999). It is unclear why the Tuckers did not raise as an issue whether this arrest is covered by the Act; but perhaps it is because the case law is to the contrary.

III. The "serious conflicts" among the circuits as to whether the effectiveness of the auxiliary aid is a question of law or fact need not be resolved in this case.

The Tuckers argue that the lower courts erred because the effectiveness of the aid is a question of fact. Petition at pgs. 21-25. But all questions of fact do not have to be resolved by the jury. If no reasonable jury could accept the Tuckers' factual claims, then the court does not have to adopt their version for purposes ruling on the motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

The Tuckers claim that despite there being "numerous genuine issue (sic) of material fact" the Sixth Circuit decided that the accommodations were effective. Petition at pgs. 20-22. The Tuckers did not identify the genuine issues of material fact that the Sixth Circuit overlooked. *Id.* But the undisputed fact is that the communications between the officers and the Tuckers were effective. Ineffective communication did not disrupt their mission. Blake's assault on Judy Crotts was the disruption in the Tuckers achieving their stated purpose. A reasonable jury could not conclude otherwise. Therefore, the Sixth Circuit committed no error that could be remedied by this Court.

Because the Act does not apply to the arrest, this Court does not need to resolve the issue of whether the effectiveness of the communication is a question of law or fact.

CONCLUSION

The Tuckers never raised the issue of the standard of proof required for the recovery of compensatory damages under the Act. Perhaps it was raised in a perfunctory manner in the court of appeals but we really don't know because it was never developed in their argument. Issues that are not developed in the argument are normally considered waived because it is not the job of the court to develop a party's argument. Likewise, the Supreme Court of the United States does not address issues not raised in

a substantive manner in the lower courts. Because the issue was not raised in a substantive manner, this Court should deny the Petition for Writ of Certiorari as to the standard of proof.

The Act does not apply to this case to the extent the City and its employees were involved. The City's police officers arrested Blake Tucker because of his violent behavior and Odis Tucker was arrested because the officers believed he was about to interfere with their attempt to arrest Blake. The Act does not apply to an in-the-field arrest in which the scene has not yet been secured and the safety of the officers and others is at stake. The district court and the court of appeals held that the Act does not apply under these circumstances. The Tuckers do not raise this as an issue in their petition.

According to the Tuckers there is a split in the circuits as to whether the effectiveness of the auxiliary aid is a question of fact or law. But the court need not reach this issue because it was correctly decided by the courts below. Just because it is a question of fact does not mean it cannot be resolved at the summary judgment stage. If the facts are such that a reasonable jury could reach only one conclusion, then even factual questions can be resolved by the court. The facts of this case establish that the written communications were effective enough for the Tuckers to be on their way home, but for Blake Tucker's criminal behavior. Therefore, this Court need not resolve the issue of whether the effectiveness of

the auxiliary aid is a question of fact, or of law; either way, the issue was correctly decided.

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IN THE

Supreme Court of the United States

ODIS TUCKER, *et al.*,

Petitioners,

v.

HARDIN COUNTY, TENNESSEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT HARDIN COUNTY, TENNESSEE

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's application of the required standard of proof for "failure-to-accommodate" claims arising under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"), does not conflict with a decision of this Court or another Court of Appeals.

2. Whether Petitioners have presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's rigorous analysis of the Petitioners' evidence and its factual findings as to the "effectiveness" of the auxiliary aids that Hardin County provided the ADA-qualified Petitioners does not conflict with a decision of this Court or another Court of Appeals.

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioners have failed to demonstrate that the Sixth Circuit's April 29, 2008 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Sixth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

Petitioners attempt to portray in their Petition a "widespread and entrenched" Circuit conflict that simply does not exist. (*See* Pet. at 14). There are no Circuit splits of significance on the required standard of proof for failure-to-accommodate claims arising under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"). The standard of proof that the Circuits require in these cases is similar, if not identical in all aspects but semantics, that the Court's intervention is unwarranted.

The Petitioners are simply incorrect in concluding that the Sixth Circuit determined as a matter of law the "effectiveness" of an auxiliary aid for an ADA qualified individual, as both the Sixth Circuit's decision and the District Court's decision were reached after each court conducted rigorous factual analyses. The issues that the Petitioners seek to present for the Court's review are inextricably fact-bound, and granting the Petition would require the Court to set aside the factual findings made by both the Sixth Circuit and the District Court.

Though cloaked in manufactured conflicts among the Circuits, the heart of the Petitioners' argument is that both the District Court and the Sixth Circuit should have created a strict liability standard to be imposed upon a public entity for the entity's failure to provide an ADA qualified individual the precise auxiliary aid that the individual requests. The Petitioners would have this Court impose liability even in circumstances when the alternative auxiliary aid provided ensures that the qualified individual receives the same opportunity of the service, benefit, or activity of the public entity that a non-disabled individual would enjoy. The Sixth Circuit declined to make such an expansion to the ADA, as should this Court.

Petitioners have failed to carry their burden in demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

Petitioners Odis, Vonnie, and Blake Tucker are deaf and mute, and the parties agree that Petitioners are qualified individuals under the ADA. (*See* Pet. Apx. at 16a). Following a domestic dispute, Savannah Police Department officers transported Blake and Odis Tucker to the Hardin County jail where they were held as arrestees charged with a variety of crimes. (Pet. Apx. at 6a, 62a). Due to the nature of the criminal charges brought against them, both were held overnight without bond until their initial court appearance the next day. (Pet. Apx. at 7a, 62a). During the course of their detention, the Hardin County jailers communicated with

Odis and Blake Tucker by exchanging handwritten notes. (Pet. Apx. at 62a-63a). As the jail was not equipped with a teletypewriter telephone ("TTY") or a telecommunications device for the deaf ("TDD"), the jailers assisted Odis and Blake in placing a phone call to Vonnie Tucker by transcribing messages from each party and using a relay telephone line for hearing-impaired persons. (Pet. Apx. at 6a-7a, 62a-63a).

The next morning, Odis and Blake Tucker were brought to court for their initial appearance. (Pet. Apx. at 7a). The judge surmised that Odis and Blake Tucker were hearing impaired, based upon their actions in the courtroom and sounds that they made, and sent a handwritten note to them stating that he would take their matter up at the end of court so that he could spend extra time with them. (Pet. Apx. at 7a, 63a). When the judge took up the Tuckers' case, a courtroom officer provided them with a written statement of their rights, the Tuckers wrote on a piece of paper that they were "not guilty", the judge set a dispositional hearing date which was provided to them in writing, and released them on their own recognizance. (Pet. Apx. at 7a, 63a).

Blake and Odis Tucker retained an attorney who contacted the court and requested that a sign language interpreter be present at the dispositional hearing. (Pet. Apx. at 7a, 63a). The presiding judge contacted the Tuckers' attorney and advised that an interpreter could not be available on the date of the scheduled hearing, but offered to continue the hearing date and reschedule it for a date on which an interpreter would be available. (Pet. Apx. at 8a, 63a). The Tuckers' attorney advised the court that he believed the matter

could be resolved through a plea agreement on the scheduled hearing date and that Vonnie Tucker could serve as an interpreter; however, if the resolution of the charges that the Tuckers' attorney anticipated did not materialize and a hearing became necessary, then he would seek a continuance so that a court-certified interpreter could be present. (Pet. Apx. at 8a, 63a).

A plea agreement was negotiated in which the charges against Odis Tucker were dismissed, and the charges against Blake Tucker were reduced. (Pet. Apx. at 8a, 63a). Blake Tucker, after having the plea agreement and his legal rights explained to him by his counsel, elected to move forward with presenting the plea agreement to the court for acceptance with Vonnie Tucker voluntarily serving as an interpreter at the Tuckers' counsel's request. (Pet. Apx. at 8a, 63a-64a). Blake Tucker, aware that a court provided interpreter was not present and that one could be made available on a different date, voluntarily chose to present his plea agreement to the court, which the court accepted. (Pet. Apx. at 8a-9a, 64a).

The Petitioners brought suit against Hardin County, Tennessee in the United States District Court for the Western District of Tennessee claiming that Hardin County violated their rights under the ADA by not having a TDD/TTY device available at the county jail, and by not having a court-provided sign language interpreter at Odis and Blake Tucker's initial appearance or at Blake Tucker's dispositional hearing. Vonnie Tucker alleged that her rights were violated through the court's use of her volunteered services as a sign language interpreter at Blake Tucker's dispositional hearing.

The District Court granted Hardin County summary judgment as to all of the Petitioners' claims brought against them, finding that Petitioners had either failed to state a claim upon which relief could be granted, lacked standing on a particular claim, or failed to demonstrate that they were discriminated against *because of* their disability in violation of the ADA. Concerning the discrimination claim under the ADA, the Petitioners were unable to show that they were denied the same "aid, benefit, or service" of their detention and court appearances that a non-disabled individual would receive. *See Tucker v. Hardin Co.,* 448 F.Supp.2d 901 (W.D.Tenn. 2006) (Pet. Apx. 61a-79a). The United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment in all respects. *Tucker v. Hardin Co., et al.*, 539 F.3d 526 (6th Cir. 2008) (Pet. Apx. 3a-43a).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or another Court of Appeals, nor do the decisions implicate a federal question that has not been resolved by this Court. Petitioners have failed to carry their burden in demonstrating that there are any compelling reasons for the Petition to be granted. *See* Sup. Ct. R. 10.

I. *The Standard of Proof that the Sixth Circuit Applied is Consistent with the Other Circuits.*

A. Petitioners Have Waived Their Argument that the Lower Courts Applied an Inconsistent Standard of Proof.

For the first time in this case, Petitioners claim that both the District Court and the Court of Appeals applied an undefined standard of proof to their ADA failure-to-accommodate claims that is inconsistent with the other Circuits. (*See* Pet. at 15-20). Petitioners did not raise this contention before either the District Court or the Sixth Circuit. Thus, Petitioners have waived this argument. *See United States v. Bean*, 537 U.S. 71, 75 n. 2 (2002) (stating that an argument was "waived" because it was "raised for the first time in his brief on the merits to this Court"); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

B. There is No Significant Conflict among the Circuits Concerning the Proof Required for an ADA Failure-to-Accommodate Claim.

In addition to waiving this argument, the Petitioners exaggerate any perceived split among the Circuits concerning the required proof for ADA failure-to-accommodate claims and have attempted to craft a Circuit split based solely upon semantics. Petitioners point to a variety of cases in which the various Circuits have used differing nomenclature to answer the fundamental question of every ADA claim: whether a disabled person was denied the benefit of a public entity's "aid, benefit, or service" that a non-disabled individual would receive *because of* the disabled individual's disability. (*See* Pet. at 15-20). For example, Petitioners submit that within the Fourth and Seventh Circuits, ADA failure-to-accommodate claims require no proof of intent to discriminate on the part of the public entity. (Pet. at 16) (*citations omitted*). Petitioners then point to the First and Eleventh Circuits for the notion that an ADA plaintiff in a failure-to-accommodate claim must satisfy a higher standard of proof by demonstrating that the public entity acted with "personal animus" to the disabled individual. (Pet. at 16) (*citations omitted*). Continuing their survey, Petitioners also submit that the Second, Ninth, and Tenth Circuits provide that "intentional discrimination" can be inferred from "deliberate indifference," in alleged contrast to the Fifth Circuit which requires proof of "intentional discrimination" but does not require proof of "deliberate indifference." (Pet at 17-18) (*citations omitted*). Petitioners contend that these alleged varying standards of proof, combined with the Sixth Circuit's

holding in this case, are inconsistent with the potential for producing differing results for ADA litigants. (Pet. at 15-20).

Petitioners fail to recognize that all of the listed Circuits require the same proof in failure-to-accommodate claims, regardless of what precise phraseology individual authoring judges of various panels throughout the federal Courts of Appeals might choose to use in a given opinion. The cases cited by Petitioners in support of their contention require that an ADA qualified individual must prove that a public entity's alleged failure to accommodate their disability caused a fundamental difference in the aid, benefit, or service that the disabled individual receives compared to what a non-disabled individual receives. *See, e.g., Fradera v. Municipality of Mayaguez*, 440 F.3d 17, 22 (1st Cir. 2006) (stating that an ADA plaintiff must show exclusion from public services because of disability); *A Helping Hand, LLC v. Balt. County*, 515 F.3d 356, 361 (4th Cir. 2008) (stating that ADA's purpose of prohibiting exclusion or denial of a public entity's services, or being discriminated against, on the basis of disability); *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 563-64 (7th Cir. 2003)(affirming summary judgment where ADA plaintiff is unable to demonstrate that public entity's alleged failure to accommodate "affected the developmentally disabled any differently than they affected all other people").

Irrespective of the words used by the differing Circuits when analyzing failure-to-accommodate claims, the question asked remains the same: "did the public

entity's alleged failure to accommodate a disability result in unequal treatment of the disabled individual?" This is the question that must be asked and answered in failure-to-accommodate claims, and the semantic differences of the Circuits reveal no fracture of this inquiry. This is the precise question that the Sixth Circuit considered with respect to Petitioners' claims the Sixth Circuit reached the conclusion that Petitioners had failed to demonstrate how Hardin County's alleged failures to accommodate their disabilities resulted in their being treated differently than non-disabled individuals. Therefore, the standard of proof that the Sixth Circuit applied in this matter is consistent with all Circuits, making this Court's review unnecessary.

II. *The Sixth Circuit Did Not Rule that the "Effectiveness" of an Auxiliary Aid is a Question of Law.*

Contrary to the Tuckers' presentation to the Court, the Sixth Circuit did not hold that the "effectiveness" of an auxiliary aid that a public entity provides to a qualified individual is a question of law. In affirming the District Court's finding that the auxiliary aid Hardin County made available to the Petitioners (the jailers' assistance in placing a telephone call) was effective, the Sixth Circuit undertook an independent factual analysis and in its *de novo* review reached the same conclusion as the District Court. The Sixth Circuit found that the auxiliary aid was effective because the communications sought to be achieved through the telephone call were, in fact, achieved. *Tucker*, 539 F.3d at 540 (Pet. Apx. at 30a).

Because the Sixth Circuit found that the undisputed material facts regarding the effectiveness of the provided auxiliary aid supported a grant of summary judgment in Hardin County's favor, Petitioners now call foul and contend that the Sixth Circuit overreached and decided the effectiveness of the provided auxiliary aid as a matter of law. The panel majority addressed Petitioners' current argument in responding to the dissent as follows:

> The dissent correctly notes that the determination here is one of fact, and we do not suggest otherwise. As is always the case in the summary judgment context, the district court assumes the facts in favor of the non-moving party and determines whether a material fact exists to create a question appropriate for submission to a jury. This is different than concluding that every factual question requires a jury determination. *We rest our decision on these facts.*

Tucker, 539 F.3d at 539 (Pet. Apx. at 29a) (emphasis added).

Petitioners cite several cases that they contend support their proposition that the effectiveness of an auxiliary aid is *always* a jury question. (Pet. at 21). These cited decisions, however, do not hold for such an inflexible rule. In *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185 (10th Cir. 2007), the questions that the Tenth Circuit found were proper for a jury to resolve were: 1) whether the public officers had knowledge of the plaintiff's disability, 2) whether

he needed an accommodation, and 3) whether he was injured by not being allowed to participate in a probable cause hearing for which his presence was not required. *Id.* at 1199. Robertson was never provided any auxiliary aids. *Id.* Unlike the *Robertson* plaintiff, Petitioners were provided an auxiliary aid, just an alternative auxiliary aid to the one that they requested. Thus, Petitioners' reliance on *Robertson* is misplaced.

Petitioners also rely upon *Chisolm v. McManimon*, 275 F.3d 315, 330 (3d Cir. 2001), in support of their position that the alternative auxiliary aids Hardin County provided to them upon their request for a TDD/TTY device is a jury question. In *Chisolm*, like *Robertson*, the jailers offered the plaintiff no alternative means of communication in response to his request for a TDD/TTY device. 275 F.3d at 318-319. Chisolm, upon his intake into the local jail, asked for a TDD/TTY device or that jail personnel contact his non-hearing impaired roommate. *Id.* The jail officials did not allow Chisolm access to a TDD/TTY or any alternative means of communication and did not contact his roommate for two days. *Id.* During this time, Chisolm was held incommunicado from his attorney, friends, or family. *Id.* Again, the present case stands in stark contract to *Chisolm*. The Hardin County jailers made diligent effort to assist the Petitioners in communicating with their family. There was no proof in the record that they were not able to effectively communicate with their family through the jailer-assisted phone call.

Petitioners also assail an Eleventh Circuit decision which, like the Sixth Circuit, found that a local jail not being equipped with a TDD/TTY device did not create

a genuine issue of fact when the hearing impaired arrestee was provided assistance by a jailer in using a relay telephone line and had access to a regular telephone line in which the disabled individual could leave messages for a loved one. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1087 (11th Cir. 2007). Instead of accepting the long standing summary judgment principle that not all factual disputes are material or require a jury, Petitioners accuse the Sixth Circuit, along with the Eleventh Circuit, of being renegade Courts at the vanguard of a seismic shift in ADA jurisprudence that will eviscerate the efficacy of the ADA.

Petitioners' argument is a thinly veiled attempt to have this Court declare that the ADA imposes strict liability on a public entity in circumstances in which a qualified individual requests a specific auxiliary aid that the public entity does not have available, even in circumstances when the public entity nonetheless provides an effective alternative. Petitioners' attempt to have a strict liability standard mandated by the Sixth Circuit failed, and should fail in this Court as well. *See Tucker*, 539 F.3d at 538-39 (Pet. Apx. at 27a-28a) (rejecting the dissent's suggestion that a public entity's failure to provide the specific accommodation requested by an ADA-qualified individual "undermines any consideration of the 'reasonableness' or 'effectiveness'" of the auxiliary aid provided). The ADA is not a strict liability statute, and no court has ever held that it is.[1]

---

[1] This clear pronouncement that strict liability will not be imposed on a public entity that provides a reasonable accommodation to a qualified individual, albeit not the specific accommodation requested, may be found in unreported cases. (Cont'd)

Like the Sixth Circuit, this Court should also decline to expand the language and requirements of the ADA this far.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent Hardin County, Tennessee respectfully requests that the Petition be denied.

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Hardin County, Tennessee

(Cont'd)
See Johnson v. Moundsvista, Inc., Civil No. 01-915 (DWF/AJB), 2002 U.S. Dist. LEXIS 16450 (D. Minn. Aug. 28, 2002) (stating that "the ADA does not create a strict liability standard; rather, an individual bringing such a cause of action must show 'tangible injury.'"); *Walters v. Universal Flavor Corp.*, No. 4:99CV00745LOD, 1999 U.S. Dist. LEXIS 22211 (E.D. Mo. Sept. 7, 1999) (stating that "[t]he ADA is not a strict liability statute").

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No. 08-1291

In The
Supreme Court of the United States

ODIS TUCKER, VONNIE TUCKER,
and BLAKE TUCKER,

Petitioners,

v.

HARDIN COUNTY, a political subdivision of State of Tennessee, SAVANNAH POLICE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS RESPONSE TO CITY OF SAVANNAH AND HARDIN COUNTY, TENNESSEE'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I. Introduction

Both of the respondents in this case have raised similar issues associated with their argument that this court should deny the Petitioners application. The first issue is that the petitioners have waived their claims by failing to raise them in the court of appeals. The second issue is primarily associated with the "merits" with respondents arguing that the court of appeals was right in its decision to dismiss petitioners claims because of its determination that the proffered aids were effective was a correct finding of fact. As will be demonstrated hereinafter, the respondents fail to present arguments that are relevant to this courts considerations in granting a petition for certiorari.

II. Petitioners Have Not Waived Their Claims of Discrimination

Both respondents suggest that the petitioners have waived their claims of discrimination by failing to raise the question of whether proof of "intentional discrimination" is required to prevail in a claim for compensatory damages under Title II of the Americans with Disability Act (ADA) *42 U.S.C. §12132*. This is clearly not born out by the record, because the court of appeals specifically affirmed the dismissal of the petitioners claim because they had failed to prove "intentional discrimination". As such, the matter was considered and ruled upon specifically by that lower court.

The petitioners in their brief to the court of appeals argued that they had presented a *prima facia* case of discrimination under the ADA presenting specific arguments explaining why petitioners had proven discriminatory conduct directed at them personally by the respondents. (Appellants 6th Cir. Brief, pgs. 32 - 54) At page 32 of their brief to the court of appeals, the petitioners specifically argued that the legal standard for discrimination by stating:

> "... a 'Public Entity' commits a 'discriminatory act' when a speech and hearing disabled person is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence or inadequacies of 'auxiliary aids'." Id. (Supporting citations omitted)

It is important to note that in their briefs to the Sixth Circuit, neither of the respondents objected to this standard, and neither specifically mentioned a requirement of proof of "intentional discrimination" or that the petitioners had failed to prove that type of discrimination. (Savannah Police Dept. 6th Cir. Brief, pg. 17; Hardin County 6th Cir. Brief, pg. 15). In their responsive brief, Savannah Police Department (Savannah) based its entire argument on the proposition that an arrest is not a service, program or activity under the ADA.[1] Hardin County based its

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[1] Savannah suggests that the petitioners have failed to address an issue decided by the court of appeals that an arrest is not a program, service or activity of a public entity under the facts of this case. (Savannah Brief at pg. 14) It is important to note that the court of appeals assumed that the arrest fell within the parameters of Title II of the ADA for purposes of its decision and

defense entirely on a factual argument that the accommodations provided were "effective" in providing the same benefits as other persons that were serving time in the jail and that went to the Hardin County General Sessions Court. Id.

In rendering its decision, the Sixth Circuit raised the requirement of proof of "intentional discrimination" for the first time as a basis for sustaining the dismissal of petitioners claims. The court suggested that a plaintiff must show that:

> ". . . the "discrimination was intentionally directed toward him or her in particular. Acts and omissions which have a disparate impact on disabled persons in general [are] not specific acts of intentional discrimination against [the plaintiff] in particular." *Tucker v. Hardin County, et al.*, 509 F.3d 526, 532 (Apx. pg. 14a).[2]

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resolved the case in favor of the respondent because it found that the petitioners had failed to prove their claim of "intentional discrimination". *Tucker*, 539 F.3d at 535 (Apx. pg. 20a - 21a). As such, that issue is not before the court.

[2] It is important to note that this is not a disparate impact case. All of the petitioners claims of discrimination involve actions that were specifically directed towards them or request for aids they personally made to the public entities that were denied or ignored. As such, the court of appeals decision is not based on a failure to prove intentional discrimination because the conduct was not directed at the petitioners personally. Instead the court has held that petitioners failed to prove intentional discrimination because they were proffered aids that the court felt were adequate or effective. Petitioners have vigorously argued that the aids were not adequate or effective throughout the proceedings of this case.

Thereafter, the opinion reviews the facts and concludes that there is no proof of "intentional discrimination" as to each event that the petitioners claim they were discriminated in because the proffered aids were "effective" in providing access to the respondents programs, services and activities. This was despite the fact that the matter was before the court on summary judgment where the evidence was to be looked at in the light most favorable to the petitioners, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The court of appeals determined that they would rest their decision on the "facts". *Tucker*, 539 F.3d at 539 (Apx. pg. 29a).

After the publication of the Sixth Circuit opinion, petitioners filed a "Petition for Rehearing or in the Alternative Hearing *En Banc*". Petitioners provided an extensive review of the facts and citations from numerous circuits presenting factual circumstances similar to petitioners claims. In each of those cited cases, the court of appeals required jury trials because there was a question of fact required to be resolved by a jury as to whether the proffered aids were adequate. Petitioners further argued that they had presented evidence to support that requirement and that the proffered accommodations were not effective. As such, no matter the adjective associated with discrimination under Title II of the ADA, petitioners argued and cited to authority supporting their claim that they had presented a *prima facia* case of discrimination under Title II of the ADA.[3] This is just as petitioners had

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[3] In the original petition filed in this court, five different standards of discrimination are demonstrated as used by the various circuits throughout the country. It is the petitioners position that no

argued from the beginning of the law suit, and this is the specific issue that they are requesting this court to hear. The court of appeals applied an analysis that used the term "intentional" to describe "discrimination. As such, the matter was before the court and was a central tenant in dismissing petitioners claims.

III. Respondents Improperly Argue the Merits of Their Defense as Justification for Denying the Petition

(a) Respondents assertion that the circuit courts factual conclusion that the proffered accommodations were effective is the legal question that is presented by petitioners.

Under *Sup. Ct. R. 10(a)*, the significant criteria for this courts consideration of a petition is whether there is a conflict among the circuit courts, not whether the decision was a correct one. Both respondents present arguments that petitioners claims against them cannot be sustained because no reasonable jury could find that the communications during their contact were ineffective. (Savannah Brief in Opposition, pg. 14; Hardin County Brief in Opposition, pg. 10 - 12) As has been typical of respondent's approach through out this

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matter the adjectives associated with the standard for discrimination, including the use of the term "intentional discrimination", they have actionable claims. For example, the petitioners repeatedly requested that they be provided a sign language interpreter throughout the various contacts with the respondents. They were never provided with one. This could certainly be considered to be an action directed at them personally and therefore an "intentional discrimination".

case, they wish to argue facts that must be looked at in the light most favorable to the petitioners. Hardin County even admits that the court of appeals conducted an independent *de novo* "factual" analysis and headlines that the Sixth Circuit did not rule that the effectiveness of the provided accommodations was a "question of law". (Hardin County Brief in Opposition to Petition, pg. 9) That then begs the legal question presented by petitioners to this court: "Is the adequacy of aids proffered by a public entity a jury question?".

A court reviewing motions for summary judgment can only make a final ruling if there are "no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* The fact finding role when there is a dispute as to the facts of a case is the responsibility of a jury. On motions for summary judgment, the court must look at the evidence in the light most favorable to the petitioners. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) Hardin County asserts and is supported by the court of appeals decision that the communication by respondents agents were effective because communications were "achieved".[4] (Hardin

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[4] The ADA imposes on a public entity a duty of more than just achieving communications. It requires that the communications be adequate to enable the disabled person to participate in the program, service or activity to the same extent as a non-disabled person. *42 U.S.C. §12132; 28 C.F.R. §35.130(b)(iii); 28 C.F.R. §35.160.* It is important to note that the basis for the factual conclusion that the communications were effective was the testimony of the non-disabled participants in the various contacts that the petitioners had with the respondents. The failure to give credence to the testimony of the hearing and speech disabled

County Reply to Petition for Cert., pg. 9) As presented in the petition, Blake and Otis Tucker testified that for them, the proffered aids were not effective and communications were not achieved in a non-discriminatory manner. (Petition for Cert., pgs 5 - 14) Savannah asserts that their proffered accommodations of lip reading and pencil and paper were effective because the communications did not disrupt the police officers mission. (Savanna Reply to Petition for Cert., pg. 15).

Neither respondent provides any argument as to why this court should not consider whether a finding of "effectiveness" or technically the "adequacy of the proffered aid" is a legal one that should be done by judges as held by the court of appeals or a factual one that should be considered by a jury as held by the Third, Eighth, and Ninth Circuits. See, *Chisolm v. McManimon*, 275 F.3d 315, 327-328 (3d Cir. 2001); *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999); *Duffy v. Riveland*, 98 F.3d 447, 454, 455 (9th Cir. 1996). Certainly, the conflicts in the circuits as to this question, as specifically delineated in the petition, amply support the conclusion that this matter should be considered by this court.

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petitioners they did not understood what was being communicated compounds the discrimination that the ADA was supposed to eliminate.

(b) The circuits are in serious conflict as to the legal issues before the court in this case.

Hardin County argues that all of the circuit conflicts presented in the Tuckers petition associated with the question of what constitutes a *prima facia* case of discrimination are in reality not in conflict. (Hardin County Brief in Opposition to Petition for Cert., pg. 7 - 9) It asserts that the fundamental question in all of the cases is whether the alleged failure to accommodate caused a fundamental difference in the aid, benefit, or service compared with what a non-disabled individual receives. (Id at pg. 7). Simply speaking, Hardin County has gone full circle back to the issue of the adequacy or effectiveness of the proffered aid. As such, it appears to present an argument that the issue as to whether discrimination has been perpetrated against a disabled person is not one of "intentional discrimination", but instead is resolved by the determination of the adequacy of the aid proffered by the respondent. In light of the demonstrated conflict in the circuits as to whether the effectiveness of a proffered aid is a factual decision to be determined by a jury or a legal one to be decided by the court, it clearly supports the necessity of this court granting the petition to resolve that conflict.

CONCLUSION

The respondents have failed to provide any proper basis for not granting the petition in this case. As such, the petition should be granted.

Respectfully submitted,
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